DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-484
Title: University of Texas Southwestern Medical Center, Petitioner
v.
Naiel Nassar
Docketed: October 19, 2012
Lower Ct: United States Court of Appeals for the Fifth Circuit
Case Nos.: (11-10338)
Decision Date: March 8, 2012
Rehearing Denied: July 19, 2012
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Oct 17 2012	Petition for a writ of certiorari filed. (Response due November 19, 2012)
Nov 5 2012	Order extending time to file response to petition to and including December 18, 2012.
Nov 19 2012	Brief amici curiae of Equal Employment Advisory Council, et al. filed.
Dec 18 2012	Brief of respondent Naiel Nassar in opposition filed.
Dec 26 2012	DISTRIBUTED for Conference of January 11, 2013.
Dec 26 2012	Reply of petitioner University of Texas Southwestern Medical Center filed. (Distributed)
Jan 14 2013	DISTRIBUTED for Conference of January 18, 2013.
Jan 18 2013	Petition GRANTED.
Feb 11 2013	SET FOR ARGUMENT ON Wednesday, April 24, 2013
Feb 26 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Feb 28 2013	Record from U.S.D.C. for Northern District of Texas is electronic.
Mar 4 2013	Joint appendix filed. (Statement of costs filed.) (Distributed)
Mar 4 2013	Brief of petitioner University of Texas Southwestern Medical Center filed. (Distributed)
Mar 4 2013	Record from U.S.C.A. for 5th Circuit is electronic.
Mar 8 2013	CIRCULATED.
Mar 8 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Mar 11 2013	Brief amici curiae of Chamber of Commerce of the United States of America and the Retail Litigation Center filed. (Distributed)
Mar 11 2013	Brief amici curiae of Equal Employment Advisory Council, et al. filed.

(Distributed)

Mar 11 2013 Brief amicus curiae of DRI - The Voice of the Defense Bar filed. (Distributed)

Mar 11 2013 Brief amici curiae of American Council on Education, et al. filed. (Distributed)

Mar 11 2013 Brief amici curiae of Michigan, et al. filed. (Distributed)

Mar 11 2013 Brief amicus curiae of New England Legal Foundation filed. (Distributed)

Mar 11 2013 Brief amicus curiae of National School Boards Association filed. (Distributed)

Mar 15 2013 Consent to filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondent Naiel Nassar.

Apr 3 2013 Brief amici curiae of Washington Lawyers Committee for Civil Rights and Urban Affairs, et al. filed. (Distributed)

Apr 3 2013 Brief of respondent Naiel Nassar filed. (Distributed)

Apr 10 2013 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.

Apr 10 2013 Brief amici curiae of American-Arab Anti-Discrimination Committee, et al. filed. (Distributed)

Apr 10 2013 Brief amicus curiae of United States filed. (Distributed)

Apr 10 2013 Brief amici curiae of Foundation for Individual Rights in Education, et al. filed. (Distributed)

Apr 10 2013 Brief amici curiae of Committee of Interns and Residents SEIU, et al. filed. (Distributed)

Apr 10 2013 Brief amicus curiae of Lawyers' Committee for Civil Rights Under Law filed. (Distributed)

Apr 10 2013 Brief amicus curiae of American Association of University Professors filed. (Distributed)

Apr 10 2013 Brief amici curiae of Employment Law Professors filed. (Distributed)

Apr 10 2013 Brief amici curiae of National Employment Lawyers Association, et al. filed. (Distributed)

Apr 10 2013 Brief amicus curiae of National Education Association filed. (Distributed)

Apr 12 2013 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

Apr 17 2013 Reply of petitioner University of Texas Southwestern Medical Center filed. (Distributed)

Apr 24 2013 Argued. For petitioner: Daryl L. Joseffer, Washington, D. C. For respondent: Brian P. Lauten, Dallas, Tex.; and Melissa Arbus Sherry, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

RECORD AND BRIEFS

12-484

No. 12-___

Supreme Court, U.S.
FILED
OCT 17 2012
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In the
Supreme Court of the United States

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER,

PETITIONER,

v.

NAIEL NASSAR, M.D.,

RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258, 268–69 (1989), a plurality of this Court held that the *discrimination* provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), requires a plaintiff to prove only that discrimination was "a motivating factor" for an adverse employment action. In contrast, *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 179–80 (2009), held that the Age Discrimination in Employment Act of 1967 (ADEA), Pub. L. 90-202, 81 Stat. 602, requires proof that age was "the but-for cause" of an adverse employment action, such that a defendant is *not* liable if it would have taken the same action for other, non-discriminatory reasons. The courts of appeals have since divided 3-2 on whether *Gross* or *Price Waterhouse* establishes the general rule for other federal employment statutes, such as Title VII's *retaliation* provision, that do not specifically authorize mixed-motive claims.

The question presented is:

Whether Title VII's retaliation provision and similarly worded statutes require a plaintiff to prove but-for causation (*i.e.*, that an employer would not have taken an adverse employment action but for an improper motive), or instead require only proof that the employer had a mixed motive (*i.e.*, that an improper motive was one of multiple reasons for the employment action).

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PETITION FOR A WRIT OF CERTIORARI

This case presents an important and frequently recurring question of federal employment law over which the courts of appeals have divided. The First, Sixth, and Seventh Circuits have construed this Court's decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S 168, 174 (2009), to mean that, unless Congress has specified otherwise, the federal employment statutes require a plaintiff to prove "but-for" causation—*i.e.*, that an employer would not have taken an adverse employment action but for an improper motive. In contrast, the Fifth and Eleventh Circuits have limited *Gross* to the ADEA. They have held that other statutes using similar or even identical language to the ADEA, such as Title VII's retaliation provision, require a plaintiff to prove only that an improper motive was one of multiple reasons for an adverse employment action. Numerous judges and commentators have acknowledged this circuit split and called for its resolution.

Because "[t]he specification of the standard of causation under [the federal employment statutes] is a decision about the kind of conduct that violates" those statutes, this is a fundamental question in civil rights law. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 237 (1989) (plurality opinion). The question also has great practical importance, in part because mixed motives are easy to allege and difficult to disprove. If a plaintiff need only allege that retaliation provided an additional motivation for an adverse employment action, employers could be held liable for even routine decisions that individual supervisors took pursuant to straightforward and

non-discriminatory policies (as happened in this case).

The issue's importance is confirmed by the numerous decisions of this and other courts addressing the question, as well as the emergence of a 3-2 circuit split within just three years of *Gross*. Only this Court can settle the deepening controversy over whether its decision in *Gross* establishes a general rule or is limited to the ADEA.

This case provides "a good vehicle" for resolving that question because it illustrates the problems with the mixed-motive approach and the reasons why the legal standard matters. *See* Pet. App. 63 (Smith, J., dissenting). The plaintiff, Dr. Naiel Nassar, contends that the University of Texas Southwestern Medical Center's ("Medical School's") Chair of Internal Medicine, Dr. Gregory Fitz, blocked his attempt to secure a new job in retaliation for Nassar's allegation that another doctor had discriminated against him. The Medical School presented undisputed documentary evidence that Fitz had consistently opposed Nassar's proposed new job *well before* Nassar engaged in any protected activity and therefore *well before* any retaliatory animus could have existed.

Under these circumstances, the mixed-motive approach was likely outcome-determinative. A jury would be hard-pressed to determine that Nassar had proven that Fitz would not have opposed the new job but for retaliation, considering that Fitz had consistently done exactly that before any basis for retaliation arose. But the Fifth Circuit's mixed-motive approach allowed the jury to hold the Medical

School liable on the theory that retaliation became an additional motive over time.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is published at 674 F.3d 448 and reproduced at Pet. App. 1. The court's order denying rehearing *en banc* is unpublished but available on Westlaw at 2012 WL 2926956 and reproduced at Pet. App. 59. The district court's final judgment is also unpublished and available on Westlaw at 2010 WL 3000877 and reproduced at Pet. App. 16.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2012. Pet. App. 1. The court denied rehearing *en banc* on July 19, 2012. *Id.* at 59–60. The Medical School timely filed this petition on October 17, 2012. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Relevant provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) are reproduced at Pet. App. 96, the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 623(a) are reproduced at Pet. App. 68, and the Americans with Disabilities Act (ADA), 42 U.S.C. § 12112(a) (2007) are reproduced at Pet. App. 99.

STATEMENT OF THE CASE

A. The Statutory Backdrop

This case concerns Title VII's *retaliation* provision. In *Price Waterhouse*, a plurality of this Court held that, if a plaintiff in a Title VII *discrimination* case proves that discrimination "played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's [membership in a protected class] into account." 490 U.S. at 258; *see also id.* at 259–60 (opinion of White, J.); *id.* at 276 (opinion of O'Connor, J.).

In the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, Congress partially abrogated *Price Waterhouse* by adopting a more nuanced scheme for Title VII discrimination claims. Congress specified that a defendant is liable if "the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). If a defendant then proves as an affirmative defense that it "would have taken the same action in the absence of the impermissible motivating factor," the court may award equitable relief (including equitable monetary relief such as front pay) and attorney's fees to the plaintiff, but not damages. *Id.* § 2000e-5(g)(2)(B).

When Congress amended Title VII's discrimination provision, it left Title VII's retaliation

provision unchanged. The latter provision continues to prohibit an employer from taking an adverse employment action against an employee "because he has opposed any practice made an unlawful employment practice" by Title VII or "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII. 42 U.S.C. § 2000e-3(a). Unlike Title VII's discrimination provision, this retaliation provision does not set forth or cross-reference a mixed-motive standard. *See id.*

Other employment statutes are similar to Title VII's retaliation provision in this respect. For example, the ADEA makes it unlawful for an employer to take adverse action against an employee "because of such individual's age," 29 U.S.C. § 623(a), or "because" the employee opposed an unlawful practice or participated in protected activity. *Id.* § 623(d).

After the Civil Rights Act of 1991, this Court held that "the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor." *Gross*, 557 U.S at 174. Instead, "under the plain language of the ADEA, . . . a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision." *Id.* at 176. Shortly thereafter, the Fifth Circuit held in *Smith v. Xerox Corp.*, 602 F.3d 320, 330 (5th Cir. 2010), that, notwithstanding *Gross*, "we must continue to allow the *Price Waterhouse* burden shifting in [Title VII retaliation] cases unless and until the Supreme Court says otherwise."

B. The Underlying Events

Nassar was an assistant professor at the Medical School from November 2001 until his resignation in July 2006. Pet. App. 2, 5; R. 3033.[1] As a faculty member, he was assigned to the AIDS clinic at Parkland Hospital, with which the Medical School was affiliated. Pet. App. 2.

Nassar felt that his supervisor, Dr. Beth Levine, treated him unfairly because of his Middle Eastern background. Pet. App. 5. After the Medical School promoted Nassar in March 2006, he began discussions with the Hospital about switching his employer. *Id.* at 4. At trial, Nassar testified that he wanted to work at "exactly the same job" at the Hospital but be employed by the Hospital instead of the Medical School, so that Levine would no longer be his supervisor. R. 2960.

The Affiliation Agreement between the Medical School and the Hospital, as well as the Hospital's bylaws, rules, and regulations, required that a physician seeking regular employment within the Hospital's geography (including the AIDS clinic) be employed by the Medical School. Pet. App. 4–6. Beginning in late March 2006, Fitz declined to approve Nassar's request to work full-time for the Hospital in the AIDS Clinic without being a Medical School faculty member. Pet. App. 5. Fitz explained at that time that the Affiliation Agreement precluded such an arrangement. *Id.*

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[1] The "R." citations refer to the record on appeal in the Fifth Circuit.

Fitz met with Nassar approximately a month later, on April 27, 2006. Recounting their meeting in an e-mail to the responsible hiring official at the Hospital that same day, Fitz wrote that, "[a]s per discussion," Nassar could not be a "Parkland employee" because "it would be against our operating agreement with Parkland to have them employ faculty directly." Defendant's Trial Exhibit, No. 14. Fitz noted that Nassar was "OK with this." *Id.*

Unknown to Fitz, a Hospital employee who lacked hiring authority continued to work behind the scenes to hire Nassar as a Hospital employee. *See* R. 2781–82. By July 3, 2006, those efforts resulted in an unsigned offer letter from the Hospital. Pet. App. 5.

On July 3, 2006, believing he had secured employment with the Hospital, Nassar wrote a letter resigning from the Medical School and accusing Levine of discriminating against him. Pet. App. 5. In that letter, Nassar thanked Fitz "for all [his] support," described his interactions with Fitz as "pleasant and positive," and called Fitz "a very honorable person." Plaintiff's Trial Exhibit 15.

Fitz first learned that Nassar was claiming illegal discrimination when he received Nassar's resignation letter on July 7, 2006. R. 2749, 2827–28, 2829; Pet. App. 5–6. Fitz was "very saddened" and "shocked," as he "had not been aware of this sentiment" by Nassar. R. 2709.

A disaffected former employee of the Medical School, Dr. Phillip Keiser, testified that, after Nassar resigned, Fitz told him that Fitz had put a stop to

Nassar's effort to be employed by the Hospital. Pet. App. 5–6; R. 2414–16. Keiser interpreted Fitz's comments as admitting retaliation. Pet. App. 5–6; R. 2417, 2471, 2538. Fitz testified that he acted based on the Affiliation Agreement, not because of retaliation. R. 2661, 2686–87, 2711, 2716–17; Pet. App. 5.

C. The District Court Proceedings

Nassar sued the Medical School for constructive discharge and retaliation. Pet. App. 6. The Medical School asked the district court to instruct the jury that it could find the school liable only if discrimination was the "but-for" cause of Fitz's actions, *i.e.*, only if Fitz would not have taken those actions in the absence of retaliatory animus. *Id.* at 112–15, 119. The district court observed that "[t]he defense has put forth a strong defense with regard to the fact that it [had] some legitimate reason, primarily, at least, it appears, based upon this affiliation agreement." *Id.* at 115.

Pursuant to the Fifth Circuit's decision in *Smith*, however, the district court rejected the Medical School's request and instructed the jury that Nassar needed to prove only that discrimination was one of multiple motives for Fitz's actions. Pet. App. 115, 47. The court noted that "it remains to be seen what the Supreme Court does with this mixed motive issue once they look at it in the context of a Title VII [case], but they haven't." *Id.* at 115.

The jury found the Medical School liable for constructive discharge and retaliation. It awarded approximately $3.5 million in damages. Pet. App. 44;

id. at 6–7. The district court reduced the damages award to approximately $735,000 and awarded Nassar roughly $490,000 in attorney's fees. *Id.* at 7.

D. The Appellate Proceedings

The court of appeals reversed the constructive discharge verdict because it was unsupported by the evidence, but upheld the jury's finding of retaliation. Pet. App. 8–12. The Medical School had argued on appeal that "[t]he district court reversibly erred in instructing the jury based on a theory of mixed-motive retaliation," but acknowledged that the Fifth Circuit had held otherwise in *Smith*. *Id.* at 63 (quoting Medical School's opening brief in Case No. 11-10338, at 42 (5th Cir. June 13, 2011)). Because the Fifth Circuit panel was bound by *Smith*, it rejected the Medical School's challenge. *Id.* at 12 n.16.

The court of appeals proceeded to uphold the retaliation verdict. It explained that the Medical School had argued "that Fitz thwarted Nassar's prospective employment at Parkland as a routine application of [the Medical School's] rights under the . . . [A]ffiliation [A]greement." Pet. App. 11. But the court found sufficient evidence from which the jury could conclude that Fitz sought "to punish Nassar for his complaints about Levine." *Id.*

After addressing various damages issues, the court of appeals remanded "for reconsideration, consistent with this opinion, of Nassar's monetary recovery and the award of attorney's fees." Pet. App. 15.

The court of appeals denied the Medical School's petition for rehearing *en banc* by a 9-6 vote. Pet. App. 60. Dissenting from the denial of rehearing *en banc*, Judge Smith wrote that *Smith* was wrongly decided, that *Smith* created a circuit split, that the question has "exceptional importance in employment law," and that "[t]his case is a good vehicle for fixing" the court's mistake in *Smith*. *Id.* at 63. Judge Smith concluded that the court's "failure to take the case en banc is a serious error." *Id.* at 67.

One of the 15 judges on the *en banc* court stated, in a concurrence to the denial of rehearing *en banc*, that the Medical School had not properly preserved this issue. Pet. App. 61–62. Judge Smith responded by describing, in a detailed footnote, all the ways in which the Medical School had raised the issue in the district court and again on appeal. *Id.* at 65–66 n.1.

E. The Remand

On remand, the district court stayed all proceedings pending this Court's action on this petition. Order Staying Case, Dkt. No. 214 (Sep. 7, 2012).

REASONS FOR GRANTING THE WRIT

The Court should grant this petition because it presents a question of great practical significance over which the courts of appeals are divided, and provides a good vehicle for addressing the question.

I. THE COURTS OF APPEALS ARE DIVIDED OVER WHETHER *GROSS* IS LIMITED TO THE ADEA, OR INSTEAD APPLIES TO OTHER EMPLOYMENT DISCRIMINATION STATUTES THAT USE SIMILAR LANGUAGE.

Although *Gross* appeared to resolve mixed-motive questions under the federal employment discrimination laws, the circuit courts' longstanding divergence on that issue has persisted. The ADEA prohibits an employer from taking an adverse employment action "because of such individual's age" or "because" the employee opposed an unlawful practice or participated in protected activity. 29 U.S.C. § 623(a) and (d). The *Gross* Court held that, "under the plain language of the ADEA, . . . a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision." *Gross*, 557 U.S. at 176. The Court explained that the "ordinary meaning" of the phrase "because of" is that "age was the 'reason' that the employer decided to act"—not merely one of the factors that led to the employer's decision. *Id.* And "nothing in the statute's text indicates that Congress has carved out an exception to that rule." *Id.* at 177.

The courts of appeals have differed on whether *Gross* established a generally applicable rule or is

limited to the ADEA. In the first major decision interpreting *Gross*, the Seventh Circuit, in an opinion by Judge Easterbrook, determined that "*Gross* . . . holds that, unless a statute (such as the Civil Rights Act of 1991) provides otherwise, demonstrating but-for causation is part of the plaintiff's burden *in all suits under federal law*." *Fairley v. Andrews*, 578 F.3d 518, 525–26 (7th Cir. 2009) (emphasis added). For that reason, the Seventh Circuit applied *Gross* to a First Amendment retaliation claim under § 1983. *Id.* at 522, 525–26.

Subsequent Seventh Circuit panels have reiterated that holding in the specific context of the employment discrimination laws, ruling that the ADA does not authorize mixed-motive claims for disparate treatment, *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 961–62 (7th Cir. 2010), or for retaliation, *Barton v. Zimmer*, 662 F.3d 448, 455–56 & n.3 (7th Cir. 2011). The court explained that, "[l]ike the ADEA, the ADA renders employers liable for employment decisions made 'because of a person's disability," and nothing else in the statute indicates that Congress meant to permit mixed-motive claims. *Serwatka*, 591 F.3d at 962. The *Serwatka* court also emphasized that its decision was consistent with an earlier Title VII retaliation case, *McNutt v. Board of Trustees of the University of Illinois*, 141 F.3d 706 (7th Cir. 1998), which held that "mixed-motive decisions based on retaliation were not" authorized by the statute. *Serwatka*, 591 F.3d at 962–63; *see also Speedy v. Rexnord Corp.*, 243 F.3d 397 (7th Cir. 2001).

In *Smith*, however, a divided panel of the Fifth Circuit split from the Seventh Circuit. The *Smith* majority "recognize[d] that the *Gross* reasoning could be applied in a similar manner to the instant case," which involved Title VII's retaliation provision. *Smith*, 602 F.3d at 328. It held, however, that "*Gross* is an ADEA case, not a Title VII case," and "the *Price Waterhouse* holding remains our guiding light." *Id.* at 329. The Fifth Circuit majority therefore sanctioned mixed-motive Title VII retaliation claims. *Id.* at 330. In doing so, it expressly disagreed with the Seventh Circuit's "broad" holding that *Gross* states the general rule for federal statutes. *Id.* at 329 n.28.

In contrast, the dissenting opinion agreed with the Seventh Circuit's decisions in *Fairley* and *Serwatka*: "As the Seventh Circuit has correctly reasoned, without statutory language indicating otherwise, the mixed-motive analysis is no longer applicable outside of Title VII discrimination, and consequently does not apply to this retaliation case." *Id.* at 336 (Jolly, J., dissenting).

The dissent also criticized the majority for relying on the "lame distinction that, although the language is identical, *Gross* was an age discrimination case under the ADEA and the case today is a retaliation case under Title VII." *Id.* at 337. "Given the uniform principle set out in *Gross*, the majority's distinction is the equivalent of saying that a principle of negligence law developed in the wreck of a green car does not apply to a subsequent case because the subsequent car is red—a meaningless distinction indeed." *Id.* The dissenters

from denial of rehearing *en banc* in this case reiterated that "[t]he panel decision in *Smith* . . . created an unnecessary circuit split," making the denial of *en banc* review "confounding." Pet. App. 67.

Three more circuits have now taken sides, deepening this division among the circuits. After observing in a Title VII retaliation case that, "[n]otably, there is a circuit split between the Fifth and Seventh Circuits on this issue," the Eleventh Circuit aligned itself with the Fifth, albeit in an unpublished decision. *Saridakis v. S. Broward Hosp. Dist.*, 468 F. App'x 926, 931 (11th Cir. 2012).

Two other circuits have gone the other way. In a deeply divided decision, the *en banc* Sixth Circuit observed that "[t]here are two ways to look at" the issue. *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 318 (6th Cir. 2012) (Sutton, J.). "One is that *Price Waterhouse* established the meaning of 'because of' for Title VII *and* other statutes with comparable causation standards . . . ." *Id.* (emphasis in original). The other is that *Price Waterhouse*'s "motivating factor" test applies only to the extent that Congress has expressly imposed it. *Id.* After concluding that "*Gross* resolves this case" by adopting the second of those views, the majority held that the ADA does not permit mixed-motive claims for the same reasons the ADEA does not. *Id.* at 318–19. The majority emphasized that it had "taken the same path" as the Seventh Circuit. *Id.* at 319.

Although the Sixth Circuit majority recognized that the *Gross* analysis is generally applicable, it purported to distinguish *Smith* because that case concerned "a different provision of *Title VII*." *Id.* at

321 (emphasis in original). But "*Smith* cannot be dismissed so easily." *Id.* at 328 (Stranch, J., concurring in part and dissenting in part). Just like the ADA and the ADEA, Title VII's retaliation provision prohibits adverse employment actions "because of" an improper purpose, with no indication that Congress intended to authorize mixed-motive claims. 42 U.S.C. § 2000e-3(a). Because the question does not turn on "the title of the statute at issue," the Sixth Circuit majority's distinction of *Smith* is no distinction at all, as the dissenters observed. *Lewis*, 681 F.3d at 328 (Stranch, J., concurring in part and dissenting in part); *see also id.* at 330 n.5 (arguing that *Smith* was correctly decided and *Serwatka* wrongly decided); *id.* at 337 & n.1 (Donald, J., dissenting) (citing *Smith* for the proposition that "the *Price Waterhouse* burden-shifting doctrine remains controlling law outside of the ADEA context").[2]

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[2] After a 2008 amendment, the ADA continues to prohibit *retaliation* "because" an individual has opposed an unlawful employment practice, but now prohibits *discrimination* "on the basis of disability." 42 U.S.C. § 12112(a); *see* ADA Amendments Act of 2008, § 5, 122 Stat. 3553. This amendment to the ADA's discrimination provision, which is only one of the statutes implicated by the circuit split, has no bearing on the court of appeals' division on the question whether *Gross* articulates a generally applicable rule for numerous statutes. Nor does the amendment alter the meaning of the ADA's discrimination provision. As *Gross* observed, "the [statutory] phrase 'based on' indicates a but-for causal relationship" and "has the same meaning as the phrase, 'because of.'" 557 U.S. at 176. The House Report explains that the amendment addresses the different question "whether a person who has been discriminated against has proven that the discrimination was based on a personal characteristic (disability), not on whether he or she has proven that the characteristic exists," and that

The First Circuit has joined the Sixth and Seventh Circuits. Expressly agreeing with *Serwatka* and *Lewis*, the First Circuit held that materially identical provisions in the Rehabilitation Act require the plaintiff to prove but-for causation. *See Palmquist v. Shinseki*, 689 F.3d 66 (1st Cir. 2012). The First Circuit understood that "*Gross* is the beacon by which we must steer, and textual similarity between the Rehabilitation Act and the ADEA compels us to reach the same conclusion here." *Id.* at 74. In drawing that conclusion, the First Circuit (like the Seventh Circuit) relied heavily on circuit precedent concerning Title VII's retaliation provision—the statute at issue in this case. *Id.* at 73–74 (citing *Tanca v. Nordberg*, 98 F.3d 680, 682–83 (1st Cir. 1996)).

Notwithstanding its reliance on Title VII retaliation authority, the First Circuit attempted to distinguish *Smith* on the ground that, "[o]n any reading, *Smith* is a case in which but-for causation is required in order to hold an employer liable." *Id.* at 75. Because *Smith* held exactly the opposite, the First Circuit's attempt to distinguish *Smith* only confirms the circuit split.

District courts in other circuits have acknowledged this circuit split. *See Fordham v. Islip Union Free Sch. Dist.*, No. 08-2310, 2012 WL 3307494, at *6 n.5 (E.D.N.Y. Aug. 13, 2012); *Mingguo Cho v. City of New York*, No. 11-1658, 2012 WL 4376047, at *10 n.21 (S.D.N.Y. July 25, 2012). The

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Congress did not intend to change a plaintiff's burden of proof. H. Rep. 110-730, pt. 2, at 21 (2008); *accord* H. Rep. 110-730, pt. 1, at 16-17 (2008).

district courts have likewise divided on the question. Following *Gross*, some district courts have held that Title VII's retaliation provision does not permit mixed-motive claims. As one of them explained, there is "no compelling reason to define 'because,' as used in Title VII's anti-retaliation provision, any differently than the Supreme Court defined the phrase 'because of' in *Gross*." *Zhang v. Children's Hosp. of Phila.*, No. 08-5540, 2011 WL 940237, at *2 (E.D. Pa. Mar. 14, 2011); *accord Hayes v. Sebelius*, 762 F. Supp. 2d 90, 110–15 (D.D.C. 2011); *Beckford v. Geithner*, 661 F. Supp. 2d 17, 25 n.3 (D.D.C. 2009). But other district courts have limited *Gross* to its ADEA roots. *See, e.g.*, *Hylind v. Xerox Corp.*, 749 F. Supp. 2d 340, 355–56 (D. Md. 2010), *vacated in part on other grounds*, Nos. 11-1318, 11-1320, 2012 WL 2019827 (4th Cir. June 6, 2012); *cf. Morrow v. Bard Access Sys., Inc.*, 833 F. Supp. 2d 1246, 1248 (D. Or. 2011).

Commentators have also noticed "the resulting circuit split," which "positions the issue for the Supreme Court to address." Kimberly Cheeseman, *Recent Development*, Smith v. Xerox Corp.: *The Fifth Circuit Maintains Mixed-Motive Applicability in Title VII Retaliation Claims*, 85 TUL. L. REV. 1395, 1406 (2011); *accord* Andrew Kenny, Comment, *The Meaning of "Because" in Employment Discrimination Law: Causation in Title VII Retaliation Cases After* Gross, 78 U. CHI. L. REV. 1031, 1032 (2011); James Concannon, *Reprisal Revisited:* Gross v. FBL Financial Services, Inc. *and the End of Mixed-Motive Title VII Retaliation*, 17 TEX. J. C.L. & C.R. 43, 85 (2011); *see also* Kourtni Mason, Article, *Totally Mixed*

Up!: An Expansive View of Smith v. Xerox *and Why Mixed-Motive Jury Instructions Should Not Be Applied in Title VII Retaliation Cases*, 38 S.U. L. REV. 345, 352–33 (2011).

II. THE COURT OF APPEALS' DECISION IS IRRECONCILABLE WITH THIS COURT'S DECISON IN *GROSS*.

The Fifth Circuit's decision cannot be squared with *Gross*. *See Smith*, 602 F.3d at 338 (Jolly, J., dissenting). Just like the ADEA, the Title VII retaliation provision "does not provide that a plaintiff may establish discrimination by showing that [retaliation] was simply a motivating factor." *Gross*, 557 U.S. at 174. Both statutes prohibit adverse employment actions against employees "because" of improper reasons. 42 U.S.C. § 2000e-3(a). Under the "ordinary meaning of [that] requirement," "a plaintiff must prove that [the improper factor] was the 'but-for' cause of the employer's adverse action." *Gross*, 557 U.S. at 176.

As with the ADEA, moreover, Congress did not add a motivating-factor provision to Title VII's *retaliation* provision when it added such provisions to Title VII's *discrimination* provision. *Compare* 42 U.S.C. § 2000e-3 (retaliation), *with id.* § 2000e-2(m) (prohibiting mixed-motive discriminatory employment practices), *and id.* § 2000e-5(g)(2)(B) (providing remedies for violations of § 2000e-2(m). *See also Gross*, 557 U.S. at 174; *Smith*, 602 F.3d at 337–38 (Jolly, J., dissenting). That "careful tailoring" of the 1991 amendments to Title VII "should be read as limiting the mixed-motive analysis to the

statutory provision under which it was codified—Title VII discrimination only, which excludes retaliation, the claim here." *Smith*, 602 F.3d at 338 (Jolly, J., dissenting) (quoting *Gross*, 557 U.S. at 178 n.5).

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT.

This question has "exceptional importance in employment law" and beyond. *See* Pet. App. 63 (Smith, J., dissenting). That importance is reflected in the issue's regular recurrence over the past quarter century, both before and after *Gross*, which makes the question more than ripe for this Court's resolution.

1. Under the court of appeals' holding, a plaintiff may establish liability by showing that retaliation provided an additional motivation for an adverse employment action. *Smith*, 602 F.3d at 329–30. The burden of proof then shifts to the defendant to try to prove, as an affirmative defense, that it would have taken the same action for other reasons. *Id.* at 330. That "pro-employee" framework puts an employer at a decided disadvantage because mixed motives are easy to allege and difficult to disprove. *See* Kenny, 78 U. CHI. L. REV. at 1032. As in this case, employers could be held liable for even routine decisions that individual supervisors took pursuant to straightforward and non-discriminatory policies. *Cf. Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1193–94 (2011).

Even if an employer carries its burden of proof on that affirmative defense, it faces significant

liability. Under the court of appeals' view, the employer is liable and subject to equitable relief and an award of attorney's fees. *See* 42 U.S.C. § 2000e-5(g)(1); *Smith*, 602 F.3d at 333. It is exonerated only from damages. 42 U.S.C. § 2000e-5(g)(2)(B)(ii).

As a result, even defendants that prevail on the affirmative defense face grave consequences. The reputational consequences alone of being held liable for a federal civil rights violation can be substantial, including for the individuals accused of perpetrating the violation.

Moreover, equitable relief and attorney's fees can be far *more* burdensome than a damages award. Equitable relief may include the intrusive remedy of ordering the defendant to reinstate a former employee or to promote or transfer a current employee. *Id.* § 2000e-5(g)(1). It may also include an award of front pay, which can total far more than the maximum $300,000 compensatory-damages award allowed by statute. *See* Pet. App. 14; *see also* 42 U.S.C. § 1981a(b)(2). Indeed, Nassar sought $4.2 million in front pay. Plaintiff's Application for Court Award of Front Pay, Dkt. No. 147, at 5 (June 11, 2010). Attorney's fees awards can likewise exceed compensatory damages. Here, the district court awarded Nassar's counsel almost half a million dollars in fees. Pet. App. 7.

An empirical study has confirmed the obvious: plaintiffs recover "significantly more often" when courts give a "so-called motivating factor instruction" to the jury. David Sherwyn & Michael Heise, *The Gross Beast of Burden of Proof: Experimental Evidence on How the Burden of Proof Influences*

Employment Discrimination Case Outcomes, 42 ARIZ. ST. L.J. 901, 944 (2010). Numerous other commentators have recognized the "extremely important practical issues" at stake. Michael Fox, *5th Circuit En Banc Request on* Smith v. Xerox, *Please!* (Mar. 25, 2010), http://employerslawyer.blogspot.com/2010/03/5th-circuit-en-banc-request-on-smith-v.html; *accord* Kenny, 78 U. CHI. L. REV. at 1032. That commentary has generally been highly critical of the Fifth Circuit's "mixed-up" and "unexpected" departure from *Gross* and *Serwatka*. *See* Mason, 38 S.U. L. REV. at 362; Richard Moberly, *The Supreme Court's Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375, 440–46 (2010).

Moreover, the issue's importance extends well beyond the employment discrimination context. Causation is an element of almost all causes of action. As noted, the Seventh Circuit construes *Gross* to hold that, unless a statute "provides otherwise, demonstrating but-for causation is part of the plaintiff's burden in *all* suits under federal law," including § 1983 actions. *Fairley*, 578 F.3d at 525–26 (emphasis added).

2. The practical importance of this question is confirmed by the frequency with which it recurs. Before this Court decided *Price Waterhouse* in 1989, "[t]his question ha[d], to say the least, left the Circuits in disarray," at least with respect to Title VII's discrimination provision. *Price Waterhouse*, 490 U.S. at 238 n.2 (citing numerous cases). After Congress partially abrogated *Price Waterhouse* with respect to Title VII discrimination claims, courts remained unclear on the treatment of other claims,

including Title VII retaliation claims. *Compare Vialpando v. Johanns*, 619 F. Supp. 2d 1107, 1119 (D. Colo. 2008) (applying but-for test to Title VII retaliation claims), *with Porter v. U.S. Agency For Int'l Development*, 240 F. Supp. 2d 5, 7 (D.D.C. 2002) (applying motivating-factor test to such claims).

Now, in the three years since *Gross*, five circuits have divided 3-2, one of them has granted *en banc* review, another has narrowly denied *en banc* review, three of the appellate decisions have drawn vigorous dissents, and numerous district courts have also weighed in. *See* pp. 11–17, *supra*. Those decisions demonstrate that, in addition to recurring frequently, the issue has percolated thoroughly. Indeed, the five circuits that have addressed the question account for 43% of the federal courts' civil-rights caseload, including 15,070 civil rights actions in fiscal year 2011 alone. *See* Administrative Office of the U.S. Courts, Judicial Business of the U.S. Courts: Fiscal Year 2011, table C-3, *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/appendices/C03Sep11.pdf.

3. Over the past decade, this Court has recognized the importance of causation issues under federal employment statutes of all types. *See, e.g.*, *Gross*, 557 U.S. 167; *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84 (2008) (burden of proof for the ADEA's "reasonable factors other than age" defense); *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158 (2007) (causation standard under Federal Employers' Liability Act); *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (evidentiary standard for obtaining a

mixed-motive jury instruction under Title VII); *Price Waterhouse*, 490 U.S. at 258.

The question presented here is at least as important as the questions presented in those cases, because the meaning of *Gross* is fundamental to the interpretation of *all* employment statutes. Especially since the current division among the lower courts turns on the meaning of this Court's decision in *Gross*, as well as its earlier plurality decision in *Price Waterhouse*, lower courts and litigants need this Court's guidance on the meaning of the Court's own precedents.

IV. THIS CASE PROVIDES AN EXCELLENT VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

This case provides an especially "good vehicle" for considering the question presented. Pet. App. 63 (Smith, J., dissenting). There is no procedural obstacle to the Court's review, and this case's fact pattern illustrates the practical importance of the issue.

1. Although respondent argued below that the Medical School had waived its objection, there is no such impediment to this Court's review. The Court reviews questions that were pressed *or* passed upon below. *See, e.g.*, *United States v. Williams*, 504 U.S. 36, 41 (1992). The question presented is properly before this Court for *both* of those reasons.

The Medical School squarely raised this issue before the court of appeals panel. Pet. App. 63 (quoting Medical School's brief). The court of appeals then reached and addressed this issue on its merits—

without even intimating there had been any waiver. *See id.* at 12 n.16. That is all this Court's pressed-or-passed-upon standard requires.

The Medical School also took pains to preserve the issue in the district court, as detailed by Judge Smith. *See* Pet. App. 65–66 n.1. A party preserves an objection to a jury instruction by raising it on the record, before closing arguments, and before instructions are read to the jury. Fed. R. Civ. P. 51(b) & (c). The Medical School "did so." Pet. App. 65–66 n.1 (Smith, J., dissenting).

In the initial charge conference, the Medical School argued that Nassar's burden was to "show that [retaliation] is the sole motive of the defendant" using "but for language," which the School described as "something more stringent than motivating factor." Pet. App. 119. The district court rejected that objection on the ground that "this case is a mixed motive retaliation case, which calls for . . . a motivating factor; that the discriminatory intent is a motivating factor, it doesn't have to be the sole motivating factor." *Id.* at 121.

Shortly before closing arguments, the Medical School pressed its but-for argument a *second* time. Pet. App. 112–15. After expressing some frustration with the Medical School's second objection, *id.* at 114, the court again denied the objection on its merits, not based on a finding of waiver. The court stated "that the mixed motive analysis still applies in a Title VII retaliation case," expressly relying on *Smith*. *Id.*

One judge on the *en banc* court nonetheless concluded that the Medical School had failed to

preserve the objection because its "own proposed jury instruction included the motivating factor instruction language used by the district court." Pet. App. 61 (Elrod, J., concurring). That is incorrect. As discussed above, the Medical School squarely objected to a mixed-motive approach twice. Judge Smith correctly explained that, "[h]aving lodged that objection, [the Medical School's] attorneys, as officers of the court, also complied with *Smith* by tendering a jury instruction that treated but-for causation as an affirmative defense." *Id.* at 66 n.1; *see id.* at 104. Even then, to make absolutely sure there would be no doubt about its position, the Medical School, "along with its proposed instruction, . . . emphasized its objection to a mixed-motive instruction by including a detailed presentation on the conflicting state of the law, citing authority supporting a but-for causation standard." *Id.* at 66 n.1; *see id.* at 104 n.8.

The Medical School is aware of *no* authority indicating that its preservation of the issue was anything short of exemplary, especially since *Smith* made the School's objection futile in the lower courts.

2. Far from presenting an obstacle to review, the facts of this case provide a great vehicle for considering the question presented. Whether Nassar was entitled to a mixed-motive instruction, or whether he had to prove that retaliation was the but-for cause of the adverse employment action, was likely outcome-determinative.

Nassar's retaliation claim is a narrow one: he contends that Fitz blocked his attempt to get a job at the Hospital's AIDS clinic in retaliation for Nassar's discrimination claim. Pet. App. 11. In response, the

Medical School presented undisputed documentary evidence that Fitz consistently opposed Nassar's proposed employment at the Hospital's AIDS clinic—based on an Affiliation Agreement between the Medical School and the Hospital—beginning well before Nassar engaged in any protected activity and therefore well before any retaliatory animus could have existed. *See* pp. 6–8, *supra*.

The jury's evaluation of these facts was significantly different under a mixed-motive instruction than it would have been under a but-for standard. A jury would be hard-pressed to determine that Nassar had proven that Fitz would not have opposed the hospital job but for retaliation, considering that Fitz consistently did exactly that before learning of any protected activity by Nassar. Indeed, the district court observed before trial that "[t]he defense has put forth a strong defense . . . based upon this [A]ffiliation [A]greement." Pet. App. 115. But the mixed-motive instruction allowed Nassar to recover if retaliation was only an additional subjective motivation for Fitz's consistent application of the Affiliation Agreement.

The only question the jury asked the district court during its deliberations confirms the importance of the mixed-motive standard. The jury asked to see "an email from Dr. Nassar to Dr. Fitz when he first complained about discrimination or being treated differently." Pet. App. 123. That question is relevant only to *when* Fitz allegedly acquired a retaliatory animus, *i.e.*, to whether Fitz settled on his course of conduct before or after any cause for retaliation arose. The facts of this case put

the practical significance of the mixed-motive instruction in stark relief.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 11-10338

NAIEL NASSAR, MD,

Plaintiff - Appellee Cross-Appellant

v.

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER,

Defendant - Appellant Cross-Appellee

Appeals from the United States District Court
for the Northern District of Texas, Dallas

OPINION

Before: REAVLEY, ELROD, and HAYNES,
Circuit Judges

Filed March 8, 2012

Dr. Naiel Nassar, the Appellee, was a member of the faculty at Appellant University of Texas Southwestern Medical Center ("UTSW"). UTSW is affiliated with Parkland Hospital, where UTSW faculty make up most of the physician staff. Nassar served as a clinician at Parkland's Amelia Court Clinic, which specializes in HIV/AIDS treatment. Nassar claimed and a jury found that he was constructively discharged from his UTSW faculty position because of racially motivated harassment by a superior. The jury also found that UTSW retaliated against Nassar by preventing him from obtaining a position at Parkland after he resigned from UTSW. Although there was sufficient evidence to support the jury's verdict on the retaliation claim, there was insufficient evidence of constructive discharge. We therefore VACATE in part, AFFIRM in part, and REMAND the case for reconsideration of Nassar's monetary recovery and attorneys' fees.

I. FACTUAL AND PROCEDURAL BACKGROUND

Dr. Naiel Nassar, who is of Middle Eastern descent, came to UTSW in 1995 to work in Parkland's Amelia Court Clinic. After three years at the Clinic, Nassar pursued additional training at the University of California at Davis. In 2001 he returned to UTSW as an Assistant Professor of Internal Medicine and Infectious Diseases and Associate Medical Director of the Clinic. His immediate supervisor was Dr. Phillip Keiser, Professor of Internal Medicine and the Clinic's Medical Director. Keiser's supervisor at UTSW was Dr. Beth Levine, whom UTSW hired in June 2004 as

Chief of Infectious Disease Medicine. Levine oversaw the Amelia Clinic, but she did not work there on a daily basis.

Upon being hired, Levine began inquiring about Nassar's productivity and billing practices. In late 2005, when referring to another doctor of Middle Eastern descent, Levine said in Nassar's presence, "Middle Easterners are lazy." In the spring of 2006, in reference to the hiring of that same doctor, Levine said they have "hired another one" in Keiser's presence. Keiser interpreted this comment as indicating that Parkland had hired another "dark skin[] Muslim like Nassar," and Keiser told Nassar what Levine had said. Keiser also informed Nassar that Levine scrutinized Nassar's productivity more than that of other doctors. When Keiser presented Levine with objective data demonstrating Nassar's high productivity, Levine began criticizing Nassar's billing practices. Her criticism did not take into account that Nassar's salary was funded by a Federal grant that precluded billing for most of his services.

During this same period, Levine suggested to Nassar that he consider applying for a promotion to become an Associate Professor. Nassar started the application process. While Nassar was soliciting recommendations for his promotion, Levine told Nassar that he was unlikely to be promoted because Dr. Mumford did not like him. Nassar later found out that Mumford was not on the Promotions and Tenure Committee ("the Committee") nor did he oppose Nassar being promoted. At another point, Levine told Nassar that he would need to switch from UTSW's "clinical scholars track" to its "clinician track" in

order to be promoted. Nassar did this. In reviewing Nassar's promotion application, the Committee and UTSW made a number of billing and productivity inquiries about Nassar and his work, which came back relatively positive but with a few criticisms about Nassar's frequent speaking engagements on behalf of pharmaceutical companies. Levine also asked Keiser why Nassar wanted to stay at UTSW instead of moving back to California, where his family was. Levine did, however, sign letters of recommendation composed by Keiser in support of Nassar's promotion. On March 1, 2006, the Committee decided to promote Nassar, effective September 1, 2006.

Despite the eventual promotion decision, Levine's harassment led Nassar to look for a way to continue working at the Clinic without being a UTSW faculty member subject to Levine's supervision. In 2005, Nassar began discussions with the Hospital about continuing his work in the Clinic as a Parkland staff physician rather than as UTSW faculty. On a number of occasions before April, 2006, Nassar met with Dr. Gregory Fitz, UTSW's Chair of Internal Medicine and Levine's immediate superior, and complained that Levine and the Committee scrutinized his productivity and billing more than that of other doctors.

UTSW presented evidence indicating that longstanding practice and UTSW and Parkland's affiliation agreement obliged Parkland to fill its staff physician posts with UTSW faculty. Nassar disputed that interpretation of the agreement and contended that some of the Parkland doctors he worked with at

the Amelia Clinic were not UTSW faculty. In any event, Parkland staff told Nassar that if he would resign from his post at UTSW then Parkland would be able to hire him to work at the Amelia Clinic. On June 3, 2006, Parkland offered Nassar a job as a staff physician on Parkland's payroll, starting on July 10, 2006. Nassar resigned from UTSW on July 3, 2006, with a letter to Fitz and other UTSW faculty. In the letter, Nassar wrote:

> The primary reason of my resignation is the continuing harassment and discrimination against me by the Infectious Diseases division chief, Dr. Beth Levine. . . . I have been threatened with denial of promotion, loss of salary support and potentially loss of my job[.] . . . [This treatment] stems from [Levine's] religious, racial and cultural bias against Arabs and Muslims that has resulted in a hostile work environment.

Fitz opposed Parkland's hiring Nassar, asserting that UTSW had a right to fill Parkland doctor positions with UTSW faculty. The jury heard conflicting evidence regarding the timing and motivation of Fitz's opposition. There was some evidence that Fitz made his decision in April 2006. But Keiser testified that he spoke with Fitz two or three days after Nassar's resignation letter. According to Keiser, the letter shocked Fitz. Fitz felt that Levine should be publicly exonerated, so he resolved to stop Parkland from hiring Nassar. Whatever the terms of the affiliation agreement, Fitz's opposition prompted Parkland to withdraw the offer giving Nassar the

July 10 start date. Nassar then accepted a position at a smaller HIV/AIDS clinic in Fresno, California.

In August 2008, Nassar filed suit in the Northern District of Texas claiming that UTSW had constructively discharged and retaliated against him, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. The jury trial was bifurcated into a liability phase and a damages phase. At the close of Nassar's case in the liability phase, UTSW moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a), which the district court denied. The jury found that Nassar's resignation from UTSW was the result of constructive discharge, and that UTSW blocked Parkland from hiring Nassar in retaliation for Nassar's statements in the July 3 letter. Nassar moved for front pay to be included as part of his recovery. The district court denied that motion and proceeded with the damages phase of the trial.

Nassar's resignation from UTSW took effect September 1, 2006, and he took up his new position at the clinic in Fresno. That clinic is run by Central California Faculty Medical Group ("CCMFG"), whose physicians are given faculty appointments at the University of California San Francisco. In the following years his salary at CCMFG has varied from $180,000 to $165,000. Nassar was making $155,095 per year (including benefits) as a UTSW Assistant Professor. If he had stayed on through the effective date of his promotion, he would have made $166,395 (including benefits). As a staff physician on Parkland's payroll, Nassar's compensation would have been approximately $240,500 per year

(including benefits). The jury awarded Nassar $436,167.66 in back pay and over three million dollars in compensatory damages.

UTSW filed a renewed motion for judgment as a matter of law, a motion for new trial, and motion for remittitur.[1] The district court denied UTSW's motions for judgment as a matter of law and for a new trial. The district court did, however, grant UTSW's motion for remittitur because of Title VII's compensatory damages cap, which required reducing the compensatory damage award to $300,000.[2] Nassar moved for attorneys' fees pursuant to 42 U.S.C. § 2000e-5(k), and the district court granted awarded $489,927.50 in fees plus court costs. UTSW timely appealed, raising challenges to the sufficiency of the evidence, the jury instructions, the back pay and compensatory damages awards, and the award of attorneys' fees. Nassar timely filed a cross-appeal challenging the district court's denial of front pay.

II. DISCUSSION

A. Sufficiency of the Evidence

We review de novo the denial of a motion for judgment as a matter of law, applying the same standard as the district court. *Travelers Casualty & Surety Co. of America v. Ernst & Young LLP*.[3] If the case has been tried to a jury, a motion for judgment as a matter of law "is a challenge to the legal

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[1] *See* FED. R. CIV. P. 50(b), 59(b), 59(e).

[2] *See* 42 U.S.C. § 1981a(b)(3)(D).

[3] 542 F.3d 475, 481 (5th Cir. 2008).

sufficiency of the evidence."[4] "[A] jury verdict must be upheld unless there is no legally sufficient evidentiary basis for the jury to do what the jury did."[5] In reviewing the sufficiency of the evidence, we "draw all reasonable inferences and resolve all credibility determinations in the light most favorable to the nonmoving party."[6] "We reverse only if the evidence points so strongly and so overwhelmingly in favor of the moving party that no reasonable juror could return a contrary verdict." *Porter v. Epps*.[7]

UTSW claims that there was insufficient evidence for the jury to have found for Nassar on either his constructive discharge claim or his retaliation claim.

1. Constructive Discharge

To succeed on a constructive discharge claim, Nassar is required to show "'working conditions . . . so intolerable that a reasonable person in the employee's position would have felt compelled to resign.'" *Aryain v. Wal-Mart Stores Tex. LP*.[8] Constructive discharge claims like the one Nassar

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[4] *Id.*

[5] *Id.* at 481-82 (internal quotation marks and citation omitted).

[6] *Id.* at 482 (internal quotation marks and citation omitted).

[7] 659 F.3d 440, 445 (5th Cir. 2011) (internal quotation marks citation and brackets omitted).

[8] 534 F.3d 473, 480 (5th Cir. 2008) (quoting *Penn. State Police v. Suders*, 542 U.S. 129, 141, 124 S. Ct. 2342, 2342 (2004)).

brought are essentially hostile work environment claims but more extreme.[9] We therefore have required plaintiffs advancing constructive discharge claims to prove the existence of an aggravating factor. *Brown v. Kinney Shoe Corp.*[10] Such factors include:

> (1) demotion; (2) reduction in salary; (3) reduction in job responsibility; (4) reassignment to menial or degrading work; (5) reassignment to work under a younger supervisor; (6) badgering harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (7) offers of early retirement or continued employment on terms less favorable than the employee's former status.[11]

Nassar proved none of these factors with the possible exception of "badgering, harassment, and

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[9] *Suders*, 542 U.S. at 146, 124 S. Ct. at 2354; *Dediol v. Best Chevrolet, Inc.*, 655 F.3d 435, 444 (5th Cir. 2011) (A constructive discharge claim "requires a greater severity or pervasiveness of harassment than the minimum required to prove a hostile work environment." (internal quotation marks omitted)). In order to establish a hostile working environment claim, a plaintiff must prove (1) he belongs to a protected group; (2) he was subjected to unwelcome harassment; (3) the harassment was based on race; (4) the harassment affected a term, condition, or privilege of employment; and (5) the employer knew or should have known of the harassment in question and failed to take prompt remedial action. *Ramsey v. Henderson*, 286 F.3d 264, 268 (5th Cir. 2002).

[10] 237 F.3d 556, 566 (5th Cir. 2001).

[11] *Dediol*, 655 F.3d at 444.

humiliation." In fact, UTSW approved Nassar's promotion to a position with a higher salary and more preferable employment terms. With respect to the harassment, when viewed in the light most favorable to the jury's verdict, Nassar proved that Levine racially harassed him, but his proof was no more than the "minimum required to prove a hostile work environment."[12] When considering the aggravating factors, it cannot be said that there was sufficient proof to show that Nassar's "working conditions were so intolerable that a reasonable employee would feel compelled to resign."[13]

2. Retaliation

The required proof for a Title VII retaliation claim is less demanding than constructive discharge. "It goes without saying that, when a race-discrimination claim has been fully tried, as has this one, this court need not parse the evidence into discrete segments corresponding to a prima facie case, an articulation of a legitimate, nondiscriminatory reason for the employer's decision, and a showing of pretext." *DeCorte v. Jordan.*[14] Our review is instead "to determine only whether the

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[12] *Id.* (internal quotation marks and citation omitted).

[13] *Brown*, 237 F.3d at 566 (internal quotation marks and citation omitted) (reversing a jury verdict on constructive discharge); *see also Brown v. Bunge Corp.*, 207 F.3d 776, 782–83 (5th Cir. 2000) (affirming summary judgment against constructive discharge claim where plaintiff was unfairly criticized, demoted, and given fewer job responsibilities).

[14] 497 F.3d 433, 437-38 (5th Cir. 2007) (internal quotation marks omitted).

record contains sufficient evidence for a reasonable jury to have made its ultimate finding that [the employer's] stated reason for [taking adverse employment action against the employee] was pretext or that, while true, was only one reason for their being fired, and race was another motivating factor."[15]

Nassar's claim is that Fitz blocked his move to become a Parkland staff physician because he complained about harassment by Levine. UTSW has argued here and at trial that Fitz thwarted Nassar's prospective employment at Parkland as a routine application of UTSW's rights under the UTSW-Parkland affiliation agreement. Viewing the evidence in the light most favorable to the jury's verdict, Nassar offered sufficient proof that Fitz invoked UTSW's putative rights under the agreement in order to punish Nassar for his complaints about Levine. Keiser testified that Fitz told him that Nassar's complaints in the resignation letter were his reason for blocking the Parkland position. UTSW put on testimony indicating that Fitz made his decision before the letter and that he regarded the matter as a routine application of the agreement. The jury considered both parties' evidence and resolved the conflict against UTSW. Since "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge," we find no basis to upset the jury's verdict that UTSW retaliated

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[15] *Id.* at 438.

against Nassar because of his complaints of racial discrimination.[16]

B. Nassar's Monetary Recovery

UTSW challenges the award of back pay and compensatory damages, and Nassar challenges the denial of front pay. All of these decisions are reviewed for abuse of discretion.[17] We have found the jury's verdict as to constructive discharge insufficiently supported, and the jury's damage award did not separate the damages awarded to Nassar for the retaliation claim and the damages awarded for the constructive discharge claim. We will therefore remand the case to the district court for recalculation of damages. *See Neill v. Diamond M. Drilling Co.*[18] Nonetheless, the parties present legal issues relating to Nassar's monetary recovery that ought to be resolved now.

1. Back Pay and Compensatory Damages

UTSW argues that back pay should have been determined by comparing Nassar's compensation at UTSW and his compensation at CCMFG, and not, as the district court allowed, by comparing his

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[16] *Id.* at 437 (internal quotation marks and citation omitted). UTSW also urges error based on the jury having been instructed on a mixed-motive theory of retaliation. UTSW concedes that its argument is foreclosed by our decision in *Smith v. Xerox Corp.*, 602 F.3d 320, 330 (5th Cir. 2010). We therefore find no error in the jury instructions.

[17] *DeCorte*, 497 F.3d at 442 (compensatory damages); *Giles v. Gen. Elec. Co.*, 245 F.3d 474, 489, 92 (5th Cir. 2001) (front pay and back pay).

[18] 426 F.2d 487, 491-92 (5th Cir. 1970).

prospective compensation at Parkland and his compensation at CCFMG. "A back pay award, as all damages awarded pursuant to Title VII, should make whole the injured party by placing that individual in the position he or she would have been in but for the discrimination." *Sellers v. Delgado Community College.*[19] By retaliating against Nassar and blocking his job with Parkland, UTSW deprived Nassar of the pay he otherwise would have earned there. Therefore, to make Nassar whole, the back pay ought to be measured against what Nassar would have made at Parkland. Title 42, United States Code, § 2000e-5(g) authorizes back pay awards. Unlawful retaliation can take the form of a former employer preventing a plaintiff from getting a job with another employer. *Robinson v. Shell Oil Co.*[20] Section 2000e-5(g) states that back pay is "payable by the employer . . . responsible for the unlawful employment practice." It does not require that the employer liable for back pay be the same entity for whom the plaintiff would have worked had he not suffered unlawful retaliation.

Nassar testified that he has suffered a decrease in his income in honoraria he receives for attending conferences and other speaking engagements. At his new post, his honoraria income is approximately one hundred thousand dollars less per year than when he

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[19] 839 F.2d 1132, 1136 (5th Cir. 1988). The district court can decide the amount of back pay on its own, or empanel an advisory jury. *Black v. Pan Am. Lab., L.L.C.*, 646 F.3d 254, 263 (5th Cir. 2011). But either party can demand a jury trial on compensatory damages. 42 U.S.C. § 1981a(c)(1).

[20] 519 U.S. 337, 346, 117 S. Ct. 843, 849 (1997).

had a UTSW affiliation. Nassar claimed that he lost approximately one hundred thousand dollars per year in honoraria. UTSW argues that it was error for the jury to have been able to consider honoraria as a part of its award of back pay. We agree. "Pay," used as a noun, means "something paid for a purpose and especially as a salary or wage."[21] Although Nassar would not have been able to obtain these honoraria without his job at UTSW, they were paid by third parties for services that were not required under the terms of his UTSW employment. Therefore, they are not akin to salary, wages, or benefits, the normal components of back pay.[22]

Compensatory damages available in a Title VII case cannot include back pay or front pay, 42 U.S.C. § 1981a(b)(2), but they do cover "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." *Id.* at § 1981a(b)(3). Nassar's lost honoraria income is thus awardable as compensatory damages to the extent the loss was caused by UTSW's blocking Nassar's position at Parkland rather than Nassar's decision to resign from UTSW. That factual question must be resolved on remand.

2. Front Pay and Attorneys' Fees

We will not address the front pay issue because we must remand for reconsideration of Nassar's

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[21] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 851 (10th ed. 1998).

[22] *See* 5 LEX K. LARSEN, LARSON ON EMPLOYMENT DISCRIMINATION § 92.06[2] (2d ed. 2011).

monetary compensation in light of our findings that there was insufficient evidence to support constructive discharge and that honoraria should not have been considered part of back pay. We believe that "it is prudent to remand the [attorneys'] fee award for reconsideration" as well. *Hitt v. Connell*.[23] We thus express no opinion on the district court's front pay decision or the fee award.

III. CONCLUSION

For the foregoing reasons, we VACATE the district court's judgment regarding UTSW's liability for constructive discharge, we AFFIRM the district court's judgment regarding liability for retaliation, and we REMAND the case for reconsideration, consistent with this opinion, of Nassar's monetary recovery and the award of attorneys' fees.

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[23] 301 F.3d 240, 251 (5th Cir. 2002).

Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISIONS

Civil Action No. 3:08-CV-1337-B

NAIEL NASSAR, MD,

Plaintiff,

v.

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, PARKLAND HEALTH & HOSPITAL SYSTEM, BETH LEVINE, M.D., AND J. GREGORY FITZ, M.D.

Defendants.

September 16, 2010

FINAL JUDGMENT

Before the Court is the motion of Plaintiff, Naiel Nassar, M.D. ("Plaintiff" or "Dr. Nassar") for entry of final judgment (doc. 148). For the reasons set forth below, the Court finds that the jury's verdict is both legally and factually supported and that entry of final judgment is appropriate. Application of Title

VII's statutory cap on compensatory damages operates to reduce the jury's award of compensatory damages to $300,000. Accordingly, the Court **GRANTS** Plaintiff's motion in part and enters judgment on the jury's verdict, as properly limited by the statute. Plaintiff shall recover back pay and benefits in the amount of $438,167.66 and compensatory damages in the amount of $300,000.

I.

BACKGROUND

Dr. Nassar, a Muslim physician of Egyptian national origin, was an Assistant Professor of Medicine at Defendant University of Texas Southwestern Medical Center at Dallas ("Defendant" or "UT Southwestern") whose primary duty was to provide patient care at the Amelia Court HIV/AIDS clinic at Parkland Hospital ("Parkland"). Plaintiff's lawsuit is grounded in allegations that he faced discriminatory and harassing treatment at UT Southwestern that constituted constructive discharge, that he reported that treatment, and that in retaliation, UT Southwestern officials blocked his attempt to gain employment at Parkland.[1]

Plaintiff's Title VII claims for constructive discharge and retaliation were tried before a jury from May 17, 2010 to May 26, 2010. The trial was

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[1] The relevant factual background is more fully described in the Court's rulings on summary judgment and Plaintiff's motion for attorneys' fees (docs. 99, 100, and 160) and the trial transcript and is set forth here only to the extent necessary to provide context for Plaintiff's motion and Defendant's objections.

bifurcated: after the jury rendered a verdict in Plaintiff's favor on liability on both the constructive discharge and retaliation claims (doc. 140), it heard evidence regarding damages. On May 26, 2010, the jury returned a damages verdict that declined Defendant's requested limitation on damages, and awarded Plaintiff back pay and benefits damages of $438,167.66 and compensatory damages of $3,187,500.00. (doc. 143).

Plaintiff promptly moved for entry of final judgment pursuant to Federal Rule of Civil Procedure 58. (doc. 148). Following trial, Defendant obtained new counsel, and the Court granted its motion to extend the response deadlines to allow Defendant to review the record so that its objections could be grounded in the record. (doc. 157). On August 13, 2010, Defendant filed its objections (doc. 170) arguing that the jury's verdicts on liability and damages were not supported by legally sufficient evidence. (doc. 170). Specifically, Defendant argues that the statutory damage cap applicable to Title VII cases precludes an award of compensatory damages in excess of $300,000. (doc. 170). Defendant further contends that the evidence is legally insufficient to support the remainder of the jury's back pay and compensatory damages award and argues that the Court should instead enter a take-nothing judgment. *Id.*

II.

ANALYSIS

Rule 58 requires a prompt entry of judgment in a separate document following a jury verdict. Fed. R.

Civ. P. 58(a). Defendant objects to entry of judgment on the grounds that the jury's verdict was excessive and not supported by legally sufficient evidence. (doc. 170 at 1). "A strong presumption exists in favor of affirming a jury award of damages." *Sanders v. Baucum*, 929 F.Supp. 1028, 1039 (N.D. Tex. 1996). An objection that the jury's award is excessive requires a "clear showing of excessiveness," and an "verdict is excessive only if it is 'contrary to right reason' or 'entirely disproportionate to the injury sustained.'" *Id.* (quoting *Caldarera v. E. Airlines, Inc.*, 705 F.2d 778, 784 (5th Cir. 1983)). Evaluation of Defendant's objections to the sufficiency of the evidence, whether related to liability or damages, similarly requires deference to the jury's findings; "the evidence is nevertheless sufficient if reasonable minds *could* make the challenged jury findings of fact based on specific evidence in the record." *Hooker v. Victoria's Secret Stores, Inc.*, 281 F.3d 1278, 2001 WL 1692436 at *2 (5th Cir. Nov. 21, 2001).[2] The Court will consider Defendant's objections to the jury's

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[2] There, the Fifth Circuit applied the "deferential 'sufficiency of the evidence' standard" to challenges brought under Rules 50 and 59 of the Federal Rules of Civil Procedure. It noted that the standard was also applicable to motions to alter or amend judgment. *Id.* (citing *Youmans v. Simon*, 791 F.2d 341, 349 (5th Cir. 1986). While Defendant's objections arise in the context of a motion to enter judgment, they are expressly grounded in the sufficiency of the evidence and will be evaluated under that standard. *See Paris v. Dallas Airmotive, Inc.*, No. 3:970-cv-208-L, 2001 WL 881278 at * 6 (N.D. Tex. July 30, 2001) (resolving evidentiary objections regarding liability and damages in a Title VII case prior to entry of judgment). Defendant's objections are briefed, replied to, and properly before the Court.

liability verdicts, compensatory damages, and back pay in turn.

A. *Defendant's Objections to Jury Verdict on Liability and Request for Take-Nothing Judgment*

At the conclusion of a Response largely devoted to issues regarding damages, Defendant lodged challenges to the sufficiency of the evidence in support of the jury's findings on liability. (doc. 170 at 8-9). Because an award of damages must necessarily rest on a foundation of liability, the Court will turn first to these objections.

Defendant first argues that "[t]here is legally insufficient evidence to support the jury's 'yes' answer to Question No. 1 of the liability verdict (doc. 140), in which the jury was asked whether Plaintiff was constructively discharged because of his race, national origin, or religious preference." (doc. 170 at 9). "To prove constructive discharge, a plaintiff must establish that working conditions were so intolerable that a reasonable employee would feel compelled to resign." *Faruki v. Parsons*, 123 F.3d 315, 319 (5th Cir. 1997). "Whether a reasonable employee would feel compelled to resign depends on the facts of each case," an objective inquiry that considers a number of aggravating factors, including "badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation." *Barrow v. New Orleans S.S. Ass'n*, 10 F.3d 292, 297 (5th Cir. 1994).

Defendant's sufficiency challenge is rooted in its contention that "no such aggravating factors exist" in this case. (doc. 170 at 9). Defendant does not

challenge the sufficiency of evidence offered in support of the remaining elements of constructive discharge. The Court concludes that a reasonable jury could find that aggravating circumstances existed that were sufficient to establish a constructive discharge. Dr. Nassar testified and was rigorously cross-examined regarding the frequency, severity, and nature of derogatory and harassing comments made by Defendant's chief of the division of infectious diseases, Dr. Beth Levine. Dr. Levine offered a different view. The jury evaluated the conflicting testimony and credited Plaintiff's factual assertions. "'Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.'" *DeCorte v. Jordan*, 497 F.3d 433, 437 (5th Cir. 2007) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000)). Further, the Court instructed the jury that "[a] plaintiff's generalized or conclusory testimony regarding his subjective belief that he was discriminated against on the basis of race, national origin, or religion is alone insufficient to constitute evidence of discrimination." (doc. 140 at 8). Dr. Nassar's testimony was largely corroborated by the testimony of Dr. Keiser and Ms. Moreno, which the jury could reasonably have credited over the conflicting testimony Defendant offered. Defendant's objections to entry of judgment on the jury's finding of constructive discharge are overruled.

Defendant also argues that "[t]here is legally insufficient evidence to support the jury's 'yes' answer to Question No. 2 of the liability verdict (doc. 140), in which the jury was asked whether Plaintiff

had proved that UT Southwestern retaliated against him by blocking or objecting to his employment by Parkland Hospital because he engaged in protected activity." (doc. 170 at 9). It argues both that the retaliation claim was "not shown as a matter of law" and that the evidence was insufficient to establish any damages from that claim. *Id.* at 9, 7-8. To support his claim for retaliation, Dr. Nassar was required to present evidence that "(1) he participated in an activity protected by Title VII; (2) his employer took an adverse employment action against him; and (3) a causal connection exists between the protected activity and the adverse employment action." *McCoy v. City of Shreveport*, 492 F.3d 551, 556-57 (5th Cir. 2007) (citing *Banks v. E. Baton Rouge Sch. Bd.*, 320 F.3d 570, 575 (5th Cir. 2003)).

Challenging the jury's liability finding on retaliation, Defendant argues "[a]s the evidence conclusively showed, UT Southwestern did not oppose Plaintiff's accepting a COPC job with Parkland Hospital" and that the evidence conclusively showed that it would have opposed Plaintiff's employment at Amelia Court based on its contractual obligations even if Dr. Nassar had never engaged in protected activity. *Id.* at 7-8. Defendant's focus on a COPC job is not relevant and does not preclude the jury as a matter of law from determining that UT Southwestern retaliated by interfering with Dr. Nassar's application for a

position at Amelia Court, the Parkland position for which Dr. Nassar testified that he applied.[3]

Defendant's remaining arguments on liability and avoidance of damages essentially request the Court rule in its favor for reasons presented to and permissibly rejected by the jury. Plaintiff and Defendant presented conflicting testimony regarding the nature and timing of facts that relate to Dr. Nassar's report of discrimination and UT Southwestern's handling of his potential employment with Parkland. At trial, UT Southwestern presented testimony that it objected to Dr. Nassar's employment at Parkland prior to any report of discrimination or harassment and that its objection was based on its understanding of its contractual obligations. Dr. Nassar countered that evidence with his own testimony of at least one conversation prior to Defendant's objections on contractual grounds, and with testimony from Dr. Keiser suggesting that Defendant's objections were based in part on Dr. Nassar's report of discrimination. Resolution of these factual issues in the face of conflicting evidence necessarily turned on the jury's evaluation of witness

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[3] Defendant also argues that Parkland never "refused to hire Plaintiff." (doc. 170 at 8). This does not preclude UT Southwestern's liability for its own acts of interference with Plaintiff's attempt to gain employment at Parkland. *See* doc. 99 at 16-18. The jury could properly have found that Parkland did not execute its offer to hire Dr. Nassar as a result of UT Southwestern's objections. Dr. Nassar presented evidence that he was offered a position to begin on a date certain. When that date passed without any further action, Dr. Nassar could have reasonably concluded, as he did, that he should seek other opportunities.

credibility. *DeCorte*, 497 F.3d at 437. Defendant has not shown that Dr. Nassar's evidence, if believed, is legally insufficient as a matter of law to sustain a finding of liability for retaliation and an award of damages.[4] As a result, Defendant's objections will not preclude entry of judgment on the jury's liability verdict, nor do they require a finding as a matter of law that no damages resulted from the retaliation.

B. *Compensatory Damages*

The jury's damages verdict awarded compensatory damages in the amount of $3,187,500.00. (doc. 143). Defendant objects on the grounds that the statutory cap limits compensatory damages to $300,000. (doc. 170 at 2-3). Defendant further argues that compensatory damages should be reduced to zero on the grounds that the evidence presented was legally insufficient to support any compensatory damages. *Id.* at 3-4.

1. Statutory Cap on Compensatory Damages

Defendant's invocation of the statutory limit on compensatory damages has merit. 42 U.S.C. § 1981a(b)(3)(D) limits specified compensatory damages to $300,000. Where the jury returns a verdict in excess of the statutory limit, it is appropriate for the Court to enter a judgment that conforms to the statute. *See Thomas v. Tex. Dep't of Crim. Justice*, 297 F.3d 361, 370 n.10 (5th Cir. 2002) (noting "[t]he jury originally awarded $1,000,000, but

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[4] Defendant's argument that it would have objected on contractual grounds regardless of Dr. Nassar's engagement in protected activity was submitted to and rejected by the jury. (doc. 143 at 6-7, Question No. 2).

the district court correctly remitted the amount to $300,000 to conform with Title VII's statutory damage caps."). Plaintiff admits that the statutory cap applies and operates to limit the jury's recovery to a maximum of $300,000. (doc. 172 at 2). Accordingly, the Court will not enter judgment on the jury's compensatory damages verdict in an amount that exceeds the statutory limit of $300,000.

2. Sufficiency of Evidence in Support of Compensatory Damages

Defendant objects to entry of a judgment on the jury's verdict that includes any compensatory damages, and further moves that the Court reduce the award to zero. (doc. 170 at 3-4). The Court's review of the jury's damages award is deferential; "[t]he damage award may be overturned only upon a clear showing of excessiveness or upon a showing that the jury was influenced by passion or prejudice." *Eliand v. Westinghouse Elec. Corp.*, 58 F.3d 176, 183 (5th Cir. 1995). The Court "must be careful, however, not to substitute [its] view of a reasonable amount for the verdict of a jury." *Dixon v. Int'l Harvester Co.*, 754 F.2d 573, 590 (5th Cir. 1985). "When deciding whether a jury award is excessive," the Court considers "the amount of the award after application of the statutory cap, not the amount given by the jury." *Giles v. Gen. Elec. Co.*, 245 F.3d 474, 487, (5th Cir. 2001).

Defendant argues that Dr. Nassar's evidence of compensatory damages "is legally insufficient and too speculative to form the basis for the jury's award of compensatory damages." (doc 170 at 3). It argues that Dr. Nassar's testimony was general and

insufficient to provide the basis for calculating compensatory damages. *Id.* at 3-4. Dr. Nassar responds that a compensatory damages award of $300,000 is not clearly excessive, particularly in light of the jury's much larger determination, and that the award is properly supported by evidence. (doc. 172 at 9-13).

Title VII allows recovery of compensatory damages that include both future pecuniary losses and compensation for intangible injuries that are less susceptible to precise calculation. *See* 42 U.S.C. § 1981a(b)(3) (listing potential elements of compensatory damages, including "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses"). The Court's instructions to the jury defined compensatory damages to only those components that had been timely and properly disclosed, and did not include language describing mental anguish or emotional pain and suffering, components which require a more particular evidentiary showing.[5]

Dr. Nassar's presentation hewed closely to the jury instructions and included testimony regarding intangible injuries and future pecuniary loss. Dr. Nassar described, among others, intangible injury in

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[5] The language was crafted in response to Defendant's objections and motions in limine. The Court also instructed the jury that its award must be limited to those compensatory damages that Dr. Nassar proved "were caused by 1) his constructive discharge because of his race, national origin, or religious preference and 2) retaliation because of his engagement in protected activity." (doc. 143 at 5).

the form of harm to his professional reputation resulting from working at a less prestigious institution, the stigma that followed his assertion of rights under Title VII, and the loss of satisfaction and enjoyment that accompanied his constructive discharge from a job and patients that he found satisfying. *See* doc. 172 at 9-13. He also testified to pecuniary losses associated with the reduced opportunity for lucrative speaking engagements.[6]

Defendant has not shown that any of this evidence was improperly considered by the jury. Further, the Court's evaluation of the jury's compensatory damages award is guided by the "maximum recovery rule," which requires the Court to remit an award only where it exceeds "the maximum amount a reasonable jury could have awarded." *Giles*, 245 F.3d at 488-89. The Court's jury instructions recognized that many elements of compensatory damages were intangible and not susceptible to precise calculation. (doc. 143 at 4-5). Dr. Nassar's testimony, while contested, was credible. *See Giles*, 245 F.3d at 487-88 (noting that courts "review with deference damage awards based on intangible harm, because the harm is subjective and evaluating it depends considerably on the demeanor of witnesses"). Defendant has not shown that the award is clearly excessive. Defendant's concern about the reliability of Dr. Nassar's long-term predictions of future pecuniary losses is not implicated given the Court's application of the

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[6] The consideration of honoraria Dr. Nassar received from third parties is further discussed *infra*, Part C.

statutory cap; Dr. Nassar's testimony about losses in the near term, together with his testimony regarding intangible factors adequately support an award of $300,000. The Court concludes that Dr. Nassar's damages testimony regarding future pecuniary losses and intangible injury could reasonably support a jury verdict in excess of $300,000 and declines to reduce the award based on Defendant's objections. Accordingly, Dr. Nassar is entitled to entry of judgment in the amount of $300,000. *See Reynolds v. Octel Commc'ns Corp.*, 924 F.Supp. 743, 746 (N.D. Tex. 1995) (applying statutory cap to entry of judgment on verdict where compensatory damages awarded by the jury exceeded the statutory allowance).

C. Sufficiency of Evidence in Support of Back Pay Award

The jury awarded back pay and benefits damages in the amount of $438,167.66. (doc. 143 at 7). Defendant objected to the jury's award on the grounds that it is excessive and not supported by the evidence. (doc. 170 at part II (C)(D)(E)).[7] Defendant argues that the jury improperly calculated back pay to include the difference in pay and benefits between Dr. Nassar's current position in California and the position he was offered at Parkland. *Id.* at 6-7. It argues that the proper measure would compare Dr.

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[7] In part II (A) of this memorandum order, the Court addressed Defendant's arguments that no damages should be awarded for Dr. Nassar's claims for discrimination and retaliation. Finding that the jury's liability determinations are supported by evidence, the Court turns to Defendant's arguments relating to the amount of back pay the jury awarded.

Nassar's current salary and benefits to what he would have received from UT Southwestern. *Id.* In addition to challenging the sufficiency of the evidentiary foundation for the jury's award, Defendant also objects to inclusion in the calculation of any honoraria, which it argues were paid by third parties and not UT Southwestern. *Id.* at 3-4. Plaintiff argues that the jury's verdict is properly supported, pointing principally to Dr. Nassar's testimony and admissions from Dr. Fitz. (doc. 172 at 5-9, 12). Dr. Nassar further contends that the evidence would support a back pay award of at least $750,860 and that the jury's verdict was not clearly excessive. *Id.* at 8.

The purpose of back pay is "to restore the plaintiff to the position he would have been in absent the discrimination." *Tyler v. Union Oil Co. Of Cal.*, 304 F.3d 379, 401 (5th Cir. 2002); *see also Pettaway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 252 (5th Cir. 1974) ("Under Title VII . . . the injured workers must be restored to the economic position they would have been but for the discrimination – their 'rightful place.'"); *Albermale Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) (same). A plaintiff is required to mitigate his damages and an award of back pay is reduced by the amount he earned in the interim. *Floca v. Homcare Health Servs., Inc.*, 845 F.2d 108, 111 (5th Cir. 1988). Consistent with the statutory goal and the governing authority, the Court instructed the jury that "[t]he purpose of awarding financial damages is to restore a victim of discrimination or retaliation to the position he would have occupied but for the intervening discriminatory or retaliatory conduct of his employer." (doc. 143 at 3). The Court instructed

the jury that it "may consider only those economic losses caused by the discriminatory or retaliatory conduct of UT Southwestern." *Id.*[8] The Court also instructed the jury on Dr. Nassar's duty to mitigate his damages. *Id.* at 2-3. "The amount of back pay that will fairly compensate a successful Title VII plaintiff is a question of fact." *Pegues v. Miss. State Emp't. Serv.*, 899 F.2d 1449, 1456 (5th Cir. 1990).

The Court concludes that jury could permissibly consider evidence of the amount Dr. Nassar would have earned at Parkland and from sources other than UT Southwestern. Defendant does not provide authority that necessarily limits an award of back pay to the amount of salary and benefits previously paid by the defendant or that categorically excludes compensation of the sort Dr. Nassar described. The focus of the inquiry, consistent with the statutory goal, must remain on the plaintiff and the identifiable financial injury he suffered as a result of unlawful employment actions. *See, e.g., Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971) ("Back pay is not a penalty imposed as a sanction for moral turpitude; it is compensation for tangible economic loss resulting from an unlawful employment practice.").[9] In a typical discrimination case, the back

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[8] In its instruction on Defendant's affirmative defense, the Court again emphasized that Dr. Nassar's damages were limited to that which he showed to be caused by UT Southwestern: "You may award damages only for injuries that Dr. Nassar proves were proximately caused by UT Southwestern's wrongful conduct." *Id.* at 5.

[9] The Court instructed the jury that "[y]ou may not award damages more than once for the same injury." (doc. 143 at 2). Nevertheless, Dr. Nassar is entitled to be made whole for all of

pay and benefits at issue are indisputably provided by the Defendant. This case also included a retaliation claim grounded in Defendant's interference with Plaintiff's offer of employment from Parkland. Dr. Nassar presented evidence, credited by the jury, that but for Defendant's retaliation, he would have been employed by Parkland and thus would be receiving greater salary and benefits than he received at either UT Southwestern or in his current position in California. (doc. 172 at 5-6). The jury was not precluded from considering this evidence in calculating damages simply because some of the disputed benefits would have been paid by Parkland rather than UT Southwestern. *See Pegues*, 899 F.2d at 1455-56 (affirming order that referral agency pay back pay based on value of earnings that potentially would have been paid by employers, rather than the defendant agency, where injuries would not have been sustained but for the agency's discrimination).

Similarly, the jury's consideration of the income Dr. Nassar received as honoraria from third parties need not be categorically excluded from the jury's consideration of back pay in this case. *See Floca*, 845 F.2d at 111 (analyzing request for back pay in light of the statutory purpose of making "persons whole for injuries suffered on account of unlawful employment discrimination") and *Pegues*, 899 F.2d at 1457 ("The measure of a back pay award is ordinarily the amount needed to make the victim whole."). The

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his injuries, and the Court further instructed the jury that "if different injuries are attributed to the separate claims, then you must compensate Dr. Nassar fully for all of his injuries." *Id.*

calculation of financial loss is necessarily case specific, and Dr. Nassar presented evidence and testimony that this income was closely related to his employment at UT Southwestern, that his employment agreement explicitly reserved the proceeds to him, and that a certain amount of speaking was encouraged and expected from physicians at an academic institution. (doc. 172 at 6-7). Dr. Nassar argued that proceeds from such activity were compensation to which he was entitled by virtue of his employment agreement with UT Southwestern and were a significant financial incentive offered to recruit and retain academic physicians. *Id.* Defendant argued that the income at issue was the subject of Dr. Nassar's dealings with third parties. (doc. 170 at 3). The parties presented conflicting evidence regarding the value of this income and the connection it had to Plaintiff's employment at UT Southwestern. The jury could permissibly conclude that certain earnings were elements of Dr. Nassar's compensation secured by his agreement with UT Southwestern and could determine to what extent their loss was caused by Defendant's actions.

Defendant's remaining objections relate to the sufficiency of the evidence to support the jury's award of $438,167.66. It contends that Dr. Nassar's testimony regarding his pay, benefits, and other income was unreliable and insufficient to support the jury's calculation. (doc. 170 at 3-5). The jury is afforded substantial discretion in its determination of damages, and will be found excessive only upon a clear showing that it is "contrary to reason" or "entirely disproportionate to the injury sustained."

Sanders, 929 F.Supp. at 1039. The jury's calculation of damages is a fact intensive exercise and requires evidentiary support, but "unrealistic exactitude is not required." *Pettaway*, 494 F.2d at 260. "Although the district court should defer to the jury's findings [on back pay], the court abuses its discretion when it enters judgment on a verdict unsupported by evidence." *Vaughn v. Sabine County*, 104 Fed. Appx. 980, 985 (5th Cir. 2004).

Dr. Nassar argues that a judgment should be entered on the jury's verdict because the verdict was "within the range shown by the evidence" and "there is a rational basis for its calculation." (doc. 172 at 8) (quoting *Neiman-Marcus Group, Inc. v. Dworkin*, 919 F.2d 368, 372 (5th Cir. 1990)). To support his conclusion, Plaintiff argues that the evidence would support a much larger judgment of $750,860. *Id.* Defendant argues that Dr. Nassar did not provide "reliable evidence of his earnings" and that the jury "awarded more than any possible calculation." (doc. 170 at 6-7).

The Court concludes that the jury's verdict reflects a permissible resolution of the contested factual issues that comprise the determination of back pay and benefits damages. Even foundational facts, such as the amount of money Dr. Nassar received in California and the value of certain benefits offered by Parkland were in dispute. Dr. Nassar testified and was extensively cross-examined regarding the basis for the figures he offered. His testimony, though contested, was grounded in his own experience and knowledge. In fixing a value of Dr. Nassar's economic loss, the jury necessarily

credited, at least in part, Dr. Nassar's testimony despite Defendant's challenges. *See Palasota v. Haggar Clothing Co.*, 499 F.3d 474, 484 (5th Cir. 2007) (finding judgment on jury verdict proper where the timing of the adverse action, entitlement to certain income, and actions taken in mitigation were in dispute). The jury's award does not exceed Dr. Nassar's maximum earning capacity or appear to be based on evidence of non-recoverable damages. *See Vaughn*, 104 Fed. Appx. at 985 (finding jury's award unsupported where it inexplicably included an amount greater than the plaintiff's maximum earning capacity). While Dr. Nassar's calculation in his Reply (doc. 172) represents a generous view of the evidence and assumes all factual disputes break in Plaintiff's favor, it is tethered to admissible testimony and evidence.[10] The jury's verdict did not fully credit Dr. Nassar's factual assertions, and its finding reflects a permissible resolution of disputed facts and a discounting of claimed injury that it found not to be caused by UT Southwestern's unlawful acts. Accordingly, the Court concludes that Defendant's objections do not preclude entry of judgment in the amount awarded by the jury.

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[10] Dr. Nassar's calculations are based on his testimony regarding the salary offered by Parkland ($185,000 per year), the value of the benefits (30% of the value of the salary), a 3% annual cost of living adjustment, and the value of the lost honoraria ($100,000 per year). (doc. 172 at 5-7). During closing arguments, Plaintiff directed the jury to evidence amounting to $693,224. These figures, though contested, are taken from Dr. Nassar's testimony. Defendant argued that the lost income from honorariums totaled roughly $200,000 over the back pay period and implored the jury to look closely at causation.

IV.

CONCLUSION

For the reasons stated above, the Court **GRANTS** Plaintiff's motion for entry of final judgment (doc. 148) in the amounts awarded by the jury, subject to the statutory limitation on compensatory damages.

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant University of Texas Southwestern Medical Center at Dallas, having been found liable to Plaintiff Naiel Nassar, M.D., shall pay back pay and benefits in the amount of $438,167.66 and compensatory damages in the amount of $300,000.

SO ORDERED

SIGNED: September 16, 2010

/s/
JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

Appendix C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:08-CV-1337-B

NAIEL NASSAR, MD,

Plaintiff,

v.

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, PARKLAND HEALTH & HOSPITAL SYSTEM, BETH LEVINE, M.D., AND J. GREGORY FITZ, M.D.

Defendants.

May 26, 2010

VERDICT OF THE JURY

We, the jury, have answered the foregoing special issues in the manner indicated in this verdict form, and returned these answers into Court as our verdict.

Date 5/26/2010

/s/
FOREPERSON

Appendix D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:08-CV-1337-B

NAIEL NASSAR, MD,

Plaintiff,

v.

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER AT DALLAS,

Defendants.

May 26, 2010

JURY INSTRUCTIONS

MEMBERS OF THE JURY:

I. General Instructions on Damages

Because you have found that UT Southwestern Medical Center is liable to Dr. Nassar for violation of both of Dr. Nassar's claims under Title VII, you must now determine whether UT Southwestern has caused Dr. Nassar damages and, if so, you must determine

the amount, if any, of those damages that is fair compensation.

Dr. Nassar must prove his damages by a preponderance of the evidence. The purpose of damages is to make a plaintiff whole -that is, to compensate Dr. Nassar for any injuries that he has suffered. You should consider the following elements of damages, and no others: (1) back pay and benefits; and (2) compensatory damages, which include future pecuniary losses, inconvenience, loss of enjoyment of life, and other nonpecuniary losses. Damages are not allowed as a punishment and cannot be imposed or increased to penalize UT Southwestern Medical Center.

The damages that you award must be fair compensation for all of Dr. Nassar's injuries, no more and no less. You must use sound discretion in fixing an award of damages, drawing reasonable inferences -where you find them appropriate -from the facts and circumstances in evidence. Computing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require that Dr. Nassar prove the amount of his losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit.

You must not award damages more than once for the same injury. For example, if Dr. Nassar establishes a dollar amount for his injuries, you must not award him any additional compensatory damages on each claim. The plaintiff is only entitled to be made whole once, and may not recover more than he

has lost. Of course, if different injuries are attributed to the separate claims, then you must compensate Dr. Nassar fully for all of his injuries.

Answer each question regarding damages separately. Do not increase or reduce the amount in one answer because of your answer to any other question about damages. Do not speculate about what Dr. Nassar's ultimate recovery mayor may not be. The Court will determine any recovery by applying the law to your findings when judgment is entered. Do not add any amount for interest on any damages you find.

A person who claims damages resulting from the wrongful act of another has a duty under the law to use reasonable diligence to mitigate -to avoid or minimize those damages.

If you find that Dr. Nassar has suffered damages, he may not recover for any item of damage which he could have avoided through reasonable effort. If you find by the preponderance of the evidence that Dr. Nassar unreasonably failed to take advantage of an opportunity to lessen his damages, you should deny him recovery for those damages which he would have avoided had he taken advantage of the opportunity.

You are the sole judge of whether Dr. Nassar acted reasonably in avoiding or minimizing his damages. An injured plaintiff may not sit idly by when presented with an opportunity to reduce his damages. However, he is not required to exercise unreasonable efforts or incur unreasonable expenses in mitigating his damages. UT Southwestern Medical

Center has the burden of proving the damages which Dr. Nassar could have mitigated. In deciding whether to reduce Dr. Nassar's damages because of his failure to mitigate, you must weigh all the evidence in light of the particular circumstances of the case, using sound discretion in deciding whether the defendant has satisfied its burden of proving that the plaintiffs conduct was not reasonable.

II. Instructions for Determination of Damages

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence:

A. *Back Pay and Benefits*

The purpose of awarding financial damages is to restore a victim of discrimination or retaliation to the position he would have occupied but for he intervening discriminatory or retaliatory conduct of his employer. Thus you may consider only those economic losses caused by the discriminatory or retaliatory conduct of UT Southwestern.

Back pay and benefits include the amounts the evidence shows Dr. Nassar would have earned, including wages and employment benefits, if he had not been subjected to UT Southwestern's unlawful conduct minus the total amount of wages and employment benefits that Dr. Nassar received in the interim.

You have found that UT Southwestern discriminated against Dr. Nassar by constructively discharging Dr. Nassar because of his race, national origin, or religious preference and that UT

Southwestern retaliated against him for engaging in protected activity. You are to assess damages, if any, for the amount Dr. Nassar showed by the preponderance of the evidence that he would have earned, including wages and employment benefits from the date of the constructive discharge or retaliation until the date of trial. You must reduce any damages you find by the amount that UT Southwestern shows by the preponderance of the evidence that Dr. Nassar earned, including wages and employment benefits in the interim. That is, you must subtract the amount that Dr. Nassar earned from other employment, including wages and employment benefits, from the date of the constructive discharge or retaliation until the date of trial.

B. *Compensatory Damages*

You may award compensatory damages for injuries that Dr. Nassar proved were caused by UT Southwestern's discriminatory and or retaliatory conduct. Compensatory damages include future pecuniary losses as well as inconvenience, loss of enjoyment of life, and other nonpecuniary losses that Dr. Nassar shows he suffered as a result of UT Southwestern's discrimination or retaliation. Future pecuniary losses do not include lost future wages and benefits. No evidence of the value of intangible things has been or need be introduced. You are not trying to determine value, but an amount that will fairly compensate Dr. Nassar for the damages he has suffered. There is no exact standard for fixing the compensation to be awarded for these elements of

damage. Any award that you make should be fair in light of the evidence presented at trial.

In determining an amount that is fair compensation for any of Dr. Nassar's damages, you may award him only those compensatory damages that he has proven were caused by 1) his constructive discharge because of his race, national origin, or religious preference and 2) retaliation because of his engagement in protected activity. The compensatory damages you award must be fair compensation for all of Dr. Nassar's damages (other than back pay and benefits contained in your answer to Question No. 3a) attributable to UT Southwestern's discrimination and/or retaliation, no more and no less.

C. ***Affirmative Defense***

You may award damages only for injuries that Dr. Nassar proves were proximately caused by UT Southwestern's wrongful conduct. Defendant is not liable for damages for actions where it shows by a preponderance of the evidence that it would have taken the same action even if Defendant had not considered inappropriate factors. Thus, when considering what damages are appropriate for Dr. Nassar's constructive discharge claim, you may not assess damages for those actions which UT Southwestern proves by a preponderance of the evidence that it would have taken even if it had not considered Dr. Nassar's race, national origin, or religious preference. When considering what damages are appropriate for Dr. Nassar's retaliation claim, you may not assess damages for those actions which UT Southwestern proves by a preponderance

of the evidence that it would have taken even if it had not considered Dr. Nassar's protected activity.

III. Questions for Calculation of Damages

A. Questions Regarding Affirmative Defense

Question No. 1:

Has defendant proven by a preponderance of the evidence that it would have taken the same actions that gave rise to plaintiffs constructive discharge claim even if it had not considered plaintiffs race, national origin or religious preference?

Instruction: Defendant has the burden of proof. If it has met its burden, answer "Yes;" otherwise, answer "No."

ANSWER:

No

If you answered "Yes," then, in response to Question No. 3, you may not assess damages for those actions which Defendant proved it would have taken regardless of Plaintiffs race, national origin or religious preference.

Question No. 2:

Has defendant proven by a preponderance of the evidence that it would have taken the same actions that gave rise to plaintiffs retaliation claim even if it had not considered plaintiffs engaging in protected activity?

Instruction: Defendant has the burden of proof. If it has met its burden, answer "Yes;" otherwise, answer "No."

ANSWER:

No

If you answered "Yes;" then, in response to Question No. 3, you may not assess damages for those actions which Defendant proved it would have taken even if it had not considered Plaintiffs engaging in protected activity.

B. Assessment of Damages

Question No. 3:

What sum of money, if paid now in cash, would fairly and reasonably compensate the plaintiff for his damages, if any, that resulted from the defendant's unlawful discrimination or retaliation?

Instruction: Indicate the amount of each category of damages that would fully compensate Dr. Nassar for the injuries he suffered as a result of UT Southwestern's unlawful discrimination or retaliation.

a. Back Pay and Benefits

Answer in dollars and cents:

$ 438,167.66

b. Compensatory Damages:

Answer in dollars and cents:

$ 3,187,500.00

SO ORDERED.

SIGNED May 26,2010

/s/ Jane J. Boyle
JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

Appendix E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:08-CV-1337-B

NAIEL NASSAR, MD,

Plaintiff,

v.

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER AT DALLAS,

Defendants.

May 24, 2010

JURY INSTRUCTIONS

MEMBERS OF THE JURY:

* * *

Retaliation for engaging in activity protected by Title VII

42 U.S.C. § 2000 et seq. (Title VII)

In answering Question No.2, you are instructed as follows:

Plaintiff alleges that defendant retaliated against him, in violation of Title VII, by defendant's blocking or objecting to his employment by Parkland because he engaged in protected activity.

In order to establish this claim, plaintiff must prove each of the following essential elements:

> First, that he engaged in protected activity;
>
> Second, that the defendant objected to or blocked the plaintiffs employment at Parkland; and
>
> Third, that the defendant took that action against the plaintiff because of his engaging in protected activity.

Protected activity includes opposing an employment practice that is unlawful under Title VII, making a charge of discrimination, or testifying, assisting, or participating in any manner in an investigation proceeding, or hearing under Title VII.

Plaintiff does not have to prove that retaliation was the defendant's only motive, but he must prove that the defendant acted at least in part to retaliate.

It is not a violation of the law, however, for an employer to make an employment decision based on factors other than the plaintiffs protected activity. The fact that an employer's business judgment-including subjective business judgment--may or may not have been fair or wise in your opinion, or that you may disagree with defendant's position, does not mean defendant unlawfully discriminated.

QUESTION NO. 2:

Did plaintiff prove that defendant retaliated against him by blocking or objecting to his employment by Parkland because he engaged in protected activity?

Instruction: Plaintiff has the burden of proof. If he has met his burden, answer "Yes;" otherwise, answer "No."

ANSWER: Yes

* * *

Appendix F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:08-CV-1337-B

NAIEL NASSAR, MD,

Plaintiff,

v.

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, PARKLAND HEALTH & HOSPITAL SYSTEM, BETH LEVINE, M.D., AND J. GREGORY FITZ, M.D.

Defendants.

March 23, 2011

ORDER

Before the Court is Defendant University of Texas Southwestern Medical Center's ("UT Southwestern") Renewed Motion for Judgment as a Matter of Law, or in the Alternative, Motion for New Trial or Remittitur, filed October 14, 2010 (doc. 187). Having considered the Motion, the Court finds no

new facts or arguments presented that change its analysis in the Final Judgment filed September 16, 2010 or the Court's other Orders and findings in this case. Accordingly, the Court finds that UT Southwestern's Motion should be and hereby is **DENIED**.

SO ORDERED.

SIGNED: MARCH 23, 2011

/s/
JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

Appendix G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:08-CV-1337-B

NAIEL NASSAR, MD,

Plaintiff,

v.

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, PARKLAND HEALTH & HOSPITAL SYSTEM, BETH LEVINE, M.D., AND J. GREGORY FITZ, M.D.

Defendants.

November 3, 2010

MEMORANDUM OPINION AND ORDER

Before the Court is Plaintiff Naiel Nassar, M.D.'s ("Nassar") Motion for Relief from the Judgment or, in the Alternative, Motion to Amend or Alter the Judgment filed September 21, 2010 (doc. 178). Upon consideration of this Motion and University of Texas Southwestern Medical Center's ("UTSW") response

thereto, as well this Court's Final Judgment of September 16, 2010 (doc. 176), the Court finds that Nassar's Motion to Amend should be and hereby is **GRANTED IN PART** and **DENIED IN PART**. Nassar is awarded prejudgment interest on the award for back pay and benefits in the amount of $46,397.75. Nassar is also awarded post-judgment interest on the award for back pay and benefits and the award for compensatory damages at the rate of 0.26%, calculated from the date of Final Judgment on September 16, 2010. However, the Court's Order of October 4, 2010 (doc. 182) stayed execution of Final Judgment until the end of any appeal of this action. Accordingly, execution of the award of prejudgment and post-judgment interest is **STAYED** until the conclusion of any appeal.

I.

PROCEDURAL HISTORY

This Court entered its Final Judgement on September 16, 2010, awarding Nassar back pay and benefits in the amount of $438,167.66 and compensatory damages in the amount of $300,000. Final J. 15 (doc. 176). Nassar timely sought prejudgment and post-judgment interest in his First Amended Complaint and also in his Motion for Entry of Judgment. First Am. Compl. ¶ 26 (doc. 11); Pl.'s Mot. Entry Final J. 2 (doc. 148). However, the Court's Final Judgment inadvertently did not address prejudgment and post-judgment interest. In response, Nassar filed the instant Motion, which UTSW opposes.

II.

LEGAL STANDARDS AND ANALYSIS

A. *Prejudgment interest*

Prejudgment interest should be awarded in order to make the plaintiff whole, as a refusal to award prejudgment interest ignores the time value of money. *Thomas v. Tex. Dep't of Criminal Justice*, 297 F.3d 361, 373 (5th Cir. 2002). A prevailing plaintiff's request for an equitable award of prejudgment interest should be granted "in all but exceptional circumstances." *Bituminous Cas. Corp. v. Vacuum Tanks, Inc.*, 75 F.3d 1048, 1057 (5th Cir. 1996) (quoting *Am. Int'l Trading Corp. v. Petroleos Mexicanos*, 835 F.2d 536, 541 (5th Cir. 1987)) (applying Texas law). Further, "[w]here an action arises under federal law, 'it is within the discretion of the district court to select an equitable rate of prejudgment interest.'" *Raspanti v. Caldera*, 2002 WL 494939, *3 (5th Cir. Mar. 15, 2002) (quoting *Hansen v. Cont'l Ins. Co.*, 940 F.2d 971, 984 (5th Cir. 1991)). The Fifth Circuit has also "approved the imposition of the federal rate of interest in Title VII cases as making a plaintiff whole, but has not held that only the federal rate of interest is appropriate" for calculating prejudgment interest. *Williams v. Trader Publ'g Co.*, 218 F.3d 481, 488 (5th Cir. 2000) (citing *Conway v. Electro Switch Corp.*, 825 F.2d 593, 600 (1st Cir. 1987)).

Nassar is entitled to prejudgment interest on his award of back pay and benefits. The Fifth Circuit has held that where a claim is governed by a federal statute and the statute is silent on the issue of

prejudgment interest, "state law is an appropriate source of guidance." *Hansen*, 940 F.2d at 984 (quoting *United States ex rel. Canion v. Randall & Blake*, 817 F.2d 1188, 1193 (5th Cir. 1987)); *see also Wesley v. Yellow Transp., Inc.*, 2010 WL 3606095, *2 (N.D. Tex. Sept. 16, 2010) (in Title VII case, "[i]n the absence of a federal statute that establishes the rate of prejudgment interest, state law guides the court's discretion in determining the interest rate"). Accordingly, the Court looks to Texas state law regarding prejudgment interest, as set forth in the Texas Finance Code Sections 304.003(a) and (c) of the Code provide that prejudgment interest shall accrue at the rate of 5% per year when the prime rate as published by the Board of Governors of the Federal Reserve System is less than 5%. *See Wesley*, 2010 WL 3606095, at *1 (applying 5% interest rate). The prime interest rate as of the date of Final Judgment, September 16, 2010, was 3.25%, and therefore an interest rate of 5% should accrue.[1] Under Texas law, the date a lawsuit is filed is a proper starting point for awarding prejudgment interest. *Wesley*, 2010 WL 3606095, at *1 n.5. The Court therefore calculates prejudgment interest computed as simple interest from August 4, 2008, when Nassar's complaint was filed, to the Court's Final Judgment on September 16, 2010. Using a 5% interest rate, interest on the back pay award of $438,167.66 is $60.02 per day,[2] and 773 days passed from the filing of the complaint

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[1] Federal Reserve Statistical Release, Selected Interest Rates, Release Date September 13, 2010, found at http://www.federalreserve.gov/releases/H15/20100913/.

[2] ($438,167.66 x 5%)/365 = $60.02

to the Final Judgment. Accordingly, Nassar is awarded $46,397.75[3] in prejudgment interest on the award of back pay and benefits.[4]

The Court, however, declines to award prejudgment interest on the award of compensatory damages. Prejudgment interest may be awarded only for past harms. *Thomas*, 297 F.3d at 373; *Boyle v. Pool Offshore Co.*, 893 F.2d 713, 719-20 (5th Cir. 1991). The jury instructions in this case as well as the Court's Final Judgment contemplate that compensatory damages in this case may include future pecuniary losses. Jury Instructions 4 (doc. 143); Final J. 8-10 (doc. 176); see also Mem. Op. and Order Sept. 16, 2010 at 6 (doc. 175) (lost honoraria or other compensation based on future speaking or lecturing engagements most appropriately viewed as compensatory damages as opposed to front pay). As such, the Court cannot discern what portion of the jury's compensatory damages award pertains to future harms. Given this inability, the Court declines

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[3] 773 x $60.02 = $46,397.75

[4] UTSW argues that the Court should not compute prejudgment interest from the date of Nassar's constructive discharge but should instead calculate it using a pro rata method. Def.'s Resp. 10-12. UTSW contends that calculating the amount of interest on the entire back pay award from the date of Nassar's constructive discharge is improper as "Plaintiff did not suffer $438,167.66 in damages on September 1, 2006," but rather over an almost four-year period. *Id.* at 12. Defendant cites no binding authority requiring a pro rata calculation. As the Court looks to Texas law for the calculation of prejudgment interest in this case, it calculates simple interest from the date of the filing of the complaint to the date of the Final Judgment. *Wesley*, 2010 WL 3606095, at *1 n.5.

to award prejudgment interest on the compensatory damages award.[5]

B. *Post-Judgment Interest*

Regardless of whether a cause of action is based on state law or federal law, federal law determines post-judgment interest. *See Boston Old Colony Ins. Co. v. Tiner Assoc., Inc.*, 288 F.3d 222, 234 (5th Cir. 2002)(noting that federal post-judgment interest applies even in diversity cases). The federal post-judgment interest rate ("federal rate") is governed by 28 U.S.C. § 1961(a), which sets the rate at the weekly average 1-year constant maturity Treasury yield for the calendar week preceding the date of judgment. For the week ending September 10, 2010, the federal rate is 0.26%.[6] Therefore, the Court awards post-judgment interest on the $438,167.66 award for back pay and benefits and on the $300,000 award for compensatory damages at the rate of 0.26%, calculated from the date of the entry of judgment on September 16, 2010.[7] The Court notes that this

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[5] Defendant also argues that the Court may not award prejudgment interest on compensatory damages as that would result in an award in excess of the statutory cap. Def.'s Resp. 7-8. The Court does not reach this argument given that it declines to award prejudgment interest on compensatory damages based on its inability to ascertain what portion of the award for compensatory damages is attributable to future harms.

[6] The applicable post-judgment interest rate for the week ending on September 10, 2010 is found at http://www.txnd.uscourts.gov/publications/interest/rate_2010_2014.html#2010.

[7] Post judgment-interest shall be compounded annually. 28 U.S.C. § 1961(b).

award is unopposed by Defendant UTSW. Def.'s Opp'n at 5 n.2.[8]

III.

CONCLUSION

For the reasons stated above, Plaintiff Nassar's Motion for Relief from the Judgment or, in the Alternative, Motion to Amend or Amend or Alter the Judgment is **GRANTED IN PART** and **DENIED IN PART**. Nassar is awarded $46,397.75 in prejudgment interest on the award of back pay and benefits. Nassar is also awarded post-judgment interest on both his award of back pay and benefits and his award of compensatory damages at the applicable federal rate of 0.26%. These awards are **STAYED** until the end of any appeal pursuant to this Court's Order of October 4, 2010. The Court declines to award pre-judgment interest on Nassar's award of compensatory damages.

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[8] Plaintiff Nassar requests that the Court use its discretion to award post-judgment interest in excess of the federal rate. Pl.'s Mot. 6. While it is clear that the Court does have the authority to award post-judgment interest in excess of the federal rate, *see, e.g.*, *Raspanti*, 2002 WL 494939, at *2-*3, it is not required, and the Court declines to exercise its discretion in such manner.

SO ORDERED.

SIGNED: November 3, 2010

/s/
JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

Appendix H

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 11-10338

NAIEL NASSAR, MD,

Plaintiff - Appellee Cross-Appellant

v.

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER,

Defendant - Appellant Cross-Appellee

Appeals from the United States District Court
for the Northern District of Texas, Dallas

ON PETITION FOR REHEARING AND
REHEARING EN BANC

(Opinion March 8, 2010, 5 Cir., 2012, 674. F.3d 448)

Before: REAVLEY, ELROD, and HAYNES,
Circuit Judges

Filed July 19, 2012

PER CURIAM:

The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, the Petition for Rehearing En Banc is also DENIED.

In the en banc poll, 6 judges voted in favor of rehearing (Jones, Jolly, Smith, Garza, Clement, and Owen), and 9 judges voted against rehearing (Davis, Stewart, Dennis, Prado, Elrod, Southwick, Haynes, Graves, and Higginson). Judge King did not participate in consideration of the rehearing en banc.

Joining in Judge Smith's dissent are Chief Judge Jones, Judge Jolly, and Judge Clement.

ENTERED FOR THE COURT

/s/ Thomas M. Reavley

THOMAS M. REAVLEY
United States Circuit Judge

JENNIFER WALKER ELROD, Circuit Judge Concurring:

I concur in the denial of rehearing en banc. I write separately to address the waiver issue that was not necessary to the panel decision but is dispositive of my decision to join the denial of the rehearing en banc. Before the panel, the parties conceded that *Smith v. Xerox Corporation*, 602 F.3d 320, 330 (5th Cir. 2010), foreclosed the University of Texas Southwestern Medical Center's ("Texas Medical") objection to the district court's motivating factor jury instruction. Therefore, the panel did not address whether that argument was waived. Texas Medical's own proposed jury instruction included the motivating factor instruction language used by the district court. On the Friday before trial, the district court held an all-afternoon hearing to entertain objections to the jury instructions, after which it admonished the parties: "I'm telling you now, no new objections." When Texas Medical raised its objection on Monday morning just before the jury came in, the district court commented that it was "unprofessional" and the argument was "probably ... waived." Moreover, Texas Medical did not argue to the district court that *Smith* was incorrect after *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009)

I agree with the district court that Texas Medical waived the argument. As such, Texas Medical cannot prevail on its argument at this stage of the case. *See Jimenez v. Wood Cnty*, 660 F.3d 841, 846 (5th Cir. 2011) (en banc) (holding that a party that failed to preserve jury instruction error by raising a proper objection could not show plain error even where the

objection would have been futile in light of controlling precedent). Therefore, I concur in the denial of rehearing en banc.

JERRY E. SMITH, Circuit Judge, Dissenting from denial of rehearing en banc:

This court should not decide cases for undisclosed reasons or determine dispositive issues *sub silentio*. Because this panel has done both, I respectfully dissent from the denial of rehearing en banc. I dissent also because *Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010), is wrongly decided and presents a question of exceptional importance in employment law. This case is a good vehicle for fixing that mistake.

I.

In its initial brief on appeal, the employer, University of Texas Southwestern Medical Center ("UTSW"), squarely raised the following issue: "The district court reversibly erred in instructing the jury based on a theory of mixed-motive retaliation." Counsel fulfilled his duty of candor as an officer of the court by acknowledging the following:

> The Medical School prefaces this argument by conceding that this Court's majority opinion in *Smith v. Xerox Corporation*, 602 F.3d 320 (5th Cir. 2010), held that a mixed motive framework can be appropriate for a Title VII retaliation claim. The Medical School respectfully disagrees with *Smith* and desires to reserve this point for further review, realizing that a panel of this Court cannot overturn *Smith*.

That acknowledgement was followed by several paragraphs of argument.

In his brief, the employee, Naiel Nassar, asserted that "UTSW's jury charge complaint has been waived." He supported that contention with a full page of argument that the objection was not timely and adequately raised. In its reply brief, UTSW refuted the waiver claim in a footnote.

Issue was thus properly joined on whether UTSW waived its objection to the mixed-motive charge. Despite having been presented with the waiver question, however, the panel ignored it, dispensing with the mixed-motive issue on the merits in a footnote that observed only that the issue was foreclosed by *Smith*. *See Nassar v. Univ. of Tex. Sw. Med. Ctr.*, 674 F.3d 448, 454 n.16 (5th Cir. 2012). There is no way to tell—because the panel does not say—whether it (1) overlooked the waiver question or (2) decided there was no waiver and therefore addressed the merits or (3) determined that waiver did not matter because the substantive issue was foreclosed by *Smith*.

UTSW filed a petition for panel rehearing and a petition for rehearing en banc. At the court's direction, Nassar filed a response to the en banc petition in which, in two pages, he once again claimed that "UTSW's jury charge complaint has been waived." UTSW obtained leave to reply and, in three pages, explained its view that there was no waiver.

In its order denying panel rehearing and rehearing en banc, the panel gives no clue whether it has even considered the thoroughly briefed waiver claim. That remains a secret. To her credit, Judge Elrod now takes a position on the waiver question,

stating in a panel concurrence that she views the issue as having been waived and that that is the reason she opposes en banc rehearing. The rest of the panel is silent.

Judge Elrod says that the reason the panel opinion did not address waiver was that it "was not necessary" because the question is foreclosed anyway. That is not completely accurate. The reason the panel needed (and still needs) to decide waiver is that UTSW specifically announced its desire to preserve the mixed-motive issue "for further review," meaning review by the en banc court (which could and should overrule *Smith*) or by the Supreme Court (which could do the same). Because UTSW is not entitled to raise a waived claim—even just to preserve it—it very much matters whether there was waiver, and both Nassar and UTSW are entitled to have this court decide the waiver question. For whatever reason, however, the panel has declined that opportunity, and the court has unwisely rejected the request to rehear the case en banc.

Even in the wake of a failed en banc poll, the waiver issue can be fixed. The panel is presented with a petition for panel rehearing and could use that vehicle to deny panel rehearing but, in the process, to declare whether the issue was waived or whether, instead, UTSW has preserved it "for further review." The panel does not explain why it declines that opportunity.[1]

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[1] I respectfully part company with Judge Elrod's careful conclusion that UTSW waived the mixed-motive issue. At least, UTSW presents a strong argument for why it was not waived.

As UTSW points out, under Federal Rule of Civil Procedure 51(b) and (c), an objection to a jury instruction is properly made and preserved by presenting it to the district court on the record, before the instructions are read to the jury, and before closing arguments. UTSW did so. It notified the district court of its objection to the mixed-motive instruction before the jury charge and arguments. The court then resolved UTSW's objection on the record.

Moreover, along with its proposed instruction, UTSW emphasized its objection to a mixed-motive instruction by including a detailed presentation on the conflicting state of the law, citing authority supporting a but-for causation standard. Having lodged that objection, UTSW's attorneys, as officers of the court, also complied with Smith by tendering a jury instruction that treated but-for causation as an affirmative defense.

UTSW raised its objection during both portions of the charge conference. During the first portion, on Friday, it argued that "the plaintiff must show that [retaliation] is the sole motive of the defendant." The court then acknowledged that UTSW took "the position it's a but-for" standard and that, if a mixed-motive analysis were not the correct state of the law, the mixed-motive instruction the court later gave to the jury would be incorrect.

The parties further considered the issue during the continuation of the charge conference on Monday. Although the court questioned whether the issue had been raised during the Friday conference, the court ruled on the merits, not on waiver, and relied on this court's analysis in Smith.

The waiver question is not by itself worthy of en banc consideration. The main point now is not whether there was waiver, but whether the panel should have addressed it. I present UTSW's arguments opposing waiver for the purpose of showing that it is a substantial, threshold question that the panel should have decided—and still has the option to decide—one way or the other.

II.

The panel decision in *Smith* should be overruled. It is an erroneous interpretation of the statute and controlling caselaw and created an unnecessary circuit split. The problems wrought by the *Smith* panel majority are convincingly explained in Judge Jolly's panel dissent, to which I defer. *See Smith v. Xerox Corp.*, 602 F.3d 320, 336-40 (5th Cir. 2010) (Jolly, J., dissenting). Unfortunately, shortly after the panel issued its majority opinion and dissent, and before a petition for en banc rehearing was filed, the parties settled. That mooted the case and deprived the en banc court of the chance to correct the error in the panel's misapplication of *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009).

This court's refusal now to reconsider *Smith* en banc is confounding. We will never know—because the court does not say—whether that refusal is because the waiver issue is seen as distracting from the en banc worthy mixed-motive question. In any event, the failure to take the case en banc is serious error from which I respectfully dissent.

Appendix I

29 U.S.C. § 623

Prohibition of Age Discrimination

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section—

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan—

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An

employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

(g) Repealed. Pub. L. 101–239, title VI, §6202(b)(3)(C)(i), Dec. 19, 1989, 103 Stat. 2233

(h) Practices of foreign corporations controlled by American employers; foreign employers not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the—

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control, of the employer and the corporation.

(i) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits—

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan—

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 1056(a)(3) of this title and section 401(a)(14)(C) of title 26, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title or section 411(a)(3)(B) of title 26, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this

paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of title 26.

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals or it is a plan permitted by subsection (m) of this section.[1]

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of title 26 and subparagraphs (C) and (D)[2] of section 411(b)(2) of title 26 shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such

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[1] So in original.

[2] See references in Text note below.

regulations apply with respect to the requirements of such sections 411(b)(1)(H) and 411(b)(2).

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 1002(24)(B) of this title and section 411(a)(8)(B) of title 26.

(9) For purposes of this subsection—

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title.

(B) The term "compensation" has the meaning provided by section 414(s) of title 26.

(10) Special rules relating to age.—

(A) Comparison to similarly situated younger individual.—

(i) In general.—A plan shall not be treated as failing to meet the requirements of paragraph (1) if a participant's accrued benefit, as determined as of any date under the terms of the plan, would be equal to or greater than that of any similarly situated, younger individual who is or could be a participant.

(ii) Similarly situated.—For purposes of this subparagraph, a participant is similarly situated to any other individual if such participant is identical to such other individual in every respect (including period

of service, compensation, position, date of hire, work history, and any other respect) except for age.

(iii) Disregard of subsidized early retirement benefits.—In determining the accrued benefit as of any date for purposes of this clause, the subsidized portion of any early retirement benefit or retirement-type subsidy shall be disregarded.

(iv) Accrued benefit.—For purposes of this subparagraph, the accrued benefit may, under the terms of the plan, be expressed as an annuity payable at normal retirement age, the balance of a hypothetical account, or the current value of the accumulated percentage of the employee's final average compensation.

(B) Applicable defined benefit plans.—

(i) Interest credits.—

(I) In general.—An applicable defined benefit plan shall be treated as failing to meet the requirements of paragraph (1) unless the terms of the plan provide that any interest credit (or an equivalent amount) for any plan year shall be at a rate which is not greater than a market rate of return. A plan shall not be treated as failing to meet the requirements of this subclause merely because the plan provides for a reasonable minimum guaranteed rate of return or for a rate of

return that is equal to the greater of a fixed or variable rate of return.

(II) Preservation of capital.—An interest credit (or an equivalent amount) of less than zero shall in no event result in the account balance or similar amount being less than the aggregate amount of contributions credited to the account.

(III) Market rate of return.—The Secretary of the Treasury may provide by regulation for rules governing the calculation of a market rate of return for purposes of subclause (I) and for permissible methods of crediting interest to the account (including fixed or variable interest rates) resulting in effective rates of return meeting the requirements of subclause (I). In the case of a governmental plan (as defined in the first sentence of section 414(d) of title 26), a rate of return or a method of crediting interest established pursuant to any provision of Federal, State, or local law (including any administrative rule or policy adopted in accordance with any such law) shall be treated as a market rate of return for purposes of subclause (I) and a permissible method of crediting interest for purposes of meeting the requirements of subclause (I), except that this sentence shall only apply to a rate of return or method of crediting interest if

such rate or method does not violate any other requirement of this chapter.

(ii) Special rule for plan conversions.—If, after June 29, 2005, an applicable plan amendment is adopted, the plan shall be treated as failing to meet the requirements of paragraph (1)(H) unless the requirements of clause (iii) are met with respect to each individual who was a participant in the plan immediately before the adoption of the amendment.

(iii) Rate of benefit accrual.—Subject to clause (iv), the requirements of this clause are met with respect to any participant if the accrued benefit of the participant under the terms of the plan as in effect after the amendment is not less than the sum of—

(I) the participant's accrued benefit for years of service before the effective date of the amendment, determined under the terms of the plan as in effect before the amendment, plus

(II) the participant's accrued benefit for years of service after the effective date of the amendment, determined under the terms of the plan as in effect after the amendment.

(iv) Special rules for early retirement subsidies.—For purposes of clause (iii)(I), the plan shall credit the accumulation account or

similar amount[3] with the amount of any early retirement benefit or retirement-type subsidy for the plan year in which the participant retires if, as of such time, the participant has met the age, years of service, and other requirements under the plan for entitlement to such benefit or subsidy.

(v) Applicable plan amendment.—For purposes of this subparagraph—

(I) In general.—The term "applicable plan amendment" means an amendment to a defined benefit plan which has the effect of converting the plan to an applicable defined benefit plan.

(II) Special rule for coordinated benefits.—If the benefits of 2 or more defined benefit plans established or maintained by an employer are coordinated in such a manner as to have the effect of the adoption of an amendment described in subclause (I), the sponsor of the defined benefit plan or plans providing for such coordination shall be treated as having adopted such a plan amendment as of the date such coordination begins.

(III) Multiple amendments.—The Secretary of the Treasury shall issue regulations to prevent the avoidance of the purposes of this subparagraph

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[3] So in original. Probably should be "similar account"

through the use of 2 or more plan amendments rather than a single amendment.

(IV) Applicable defined benefit plan.—For purposes of this subparagraph, the term "applicable defined benefit plan" has the meaning given such term by section 1053(f)(3) of this title.

(vi) Termination requirements.—An applicable defined benefit plan shall not be treated as meeting the requirements of clause (i) unless the plan provides that, upon the termination of the plan—

(I) if the interest credit rate (or an equivalent amount) under the plan is a variable rate, the rate of interest used to determine accrued benefits under the plan shall be equal to the average of the rates of interest used under the plan during the 5-year period ending on the termination date, and

(II) the interest rate and mortality table used to determine the amount of any benefit under the plan payable in the form of an annuity payable at normal retirement age shall be the rate and table specified under the plan for such purpose as of the termination date, except that if such interest rate is a variable rate, the interest rate shall be determined under the rules of subclause (I).

(C) Certain offsets permitted.—A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the plan provides offsets against benefits under the plan to the extent such offsets are allowable in applying the requirements of section 401(a) of title 26.

(D) Permitted disparities in plan contributions or benefits.—A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the plan provides a disparity in contributions or benefits with respect to which the requirements of section 401(l) of title 26 are met.

(E) Indexing permitted.—

(i) In general.—A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the plan provides for indexing of accrued benefits under the plan.

(ii) Protection against loss.—Except in the case of any benefit provided in the form of a variable annuity, clause (i) shall not apply with respect to any indexing which results in an accrued benefit less than the accrued benefit determined without regard to such indexing.

(iii) Indexing.—For purposes of this subparagraph, the term "indexing" means, in connection with an accrued benefit, the periodic adjustment of the accrued benefit by

means of the application of a recognized investment index or methodology.

(F) Early retirement benefit or retirement-type subsidy.—For purposes of this paragraph, the terms "early retirement benefit" and "retirement-type subsidy" have the meaning given such terms in section 1054(g)(2)(A) of this title.

(G) Benefit accrued to date.—For purposes of this paragraph, any reference to the accrued benefit shall be a reference to such benefit accrued to date.

(j) Employment as firefighter or law enforcement officer

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken—

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of 1996 if the individual was discharged after the date described in such section, and the individual has attained—

(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or

(B)(i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after September 30, 1996; or

(ii) if applicable State or local law was enacted after September 30, 1996, and the individual was discharged, the higher of—

(I) the age of retirement in effect on the date of such discharge under such law; and

(II) age 55; and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

(k) Seniority system or employee benefit plan; compliance

A seniority system or employee benefit plan shall comply with this chapter regardless of the date of adoption of such system or plan.

***(l)* Lawful practices; minimum age as condition of eligibility for retirement benefits; deductions from severance pay; reduction of long-term disability benefits**

Notwithstanding clause (i) or (ii) of subsection (f)(2)(B) of this section—

(1)(A) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because—

(i) an employee pension benefit plan (as defined in section 1002(2) of this title)

provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits; or

(ii) a defined benefit plan (as defined in section 1002(35) of this title) provides for—

(I) payments that constitute the subsidized portion of an early retirement benefit; or

(II) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (42 U.S.C. 401 et seq.), and that do not exceed such old-age insurance benefits.

(B) A voluntary early retirement incentive plan that—

(i) is maintained by—

(I) a local educational agency (as defined in section 7801 of title 20,[4] or

(II) an education association which principally represents employees of 1 or more agencies described in subclause (I) and which is described in section 501(c)(5) or (6) of title 26 and exempt

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[4] So in original. A closing parenthesis probably should follow "20"

from taxation under section 501(a) of title 26, and

(ii) makes payments or supplements described in subclauses (I) and (II) of subparagraph (A)(ii) in coordination with a defined benefit plan (as so defined) maintained by an eligible employer described in section 457(e)(1)(A) of title 26 or by an education association described in clause (i)(II),

shall be treated solely for purposes of subparagraph (A)(ii) as if it were a part of the defined benefit plan with respect to such payments or supplements. Payments or supplements under such a voluntary early retirement incentive plan shall not constitute severance pay for purposes of paragraph (2).

(2)(A) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because following a contingent event unrelated to age—

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension; or

(iii) the values described in both clauses (i) and (ii);

are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph (A)(i), the amount of the deduction available pursuant to subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

(C) For purposes of this paragraph, severance pay shall include that portion of supplemental unemployment compensation benefits (as described in section 501(c)(17) of title 26) that—

(i) constitutes additional benefits of up to 52 weeks;

(ii) has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and

(iii) is discontinued once the individual becomes eligible for an immediate and unreduced pension.

(D) For purposes of this paragraph and solely in order to make the deduction authorized under this paragraph, the term "retiree health benefits" means benefits provided pursuant to a group health plan covering retirees, for which (determined as of the contingent event unrelated to age)—

(i) the package of benefits provided by the employer for the retirees who are below age 65 is at least comparable to benefits

provided under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.);

(ii) the package of benefits provided by the employer for the retirees who are age 65 and above is at least comparable to that offered under a plan that provides a benefit package with one-fourth the value of benefits provided under title XVIII of such Act; or

(iii) the package of benefits provided by the employer is as described in clauses (i) and (ii).

(E)(i) If the obligation of the employer to provide retiree health benefits is of limited duration, the value for each individual shall be calculated at a rate of $3,000 per year for benefit years before age 65, and $750 per year for benefit years beginning at age 65 and above.

(ii) If the obligation of the employer to provide retiree health benefits is of unlimited duration, the value for each individual shall be calculated at a rate of $48,000 for individuals below age 65, and $24,000 for individuals age 65 and above.

(iii) The values described in clauses (i) and (ii) shall be calculated based on the age of the individual as of the date of the contingent event unrelated to age. The values are effective on October 16, 1990, and shall be adjusted on an annual basis, with respect to a contingent event that occurs subsequent to the first year after October 16, 1990, based on the medical component of the Consumer Price Index for all-

urban consumers published by the Department of Labor.

(iv) If an individual is required to pay a premium for retiree health benefits, the value calculated pursuant to this subparagraph shall be reduced by whatever percentage of the overall premium the individual is required to pay.

(F) If an employer that has implemented a deduction pursuant to subparagraph (A) fails to fulfill the obligation described in subparagraph (E), any aggrieved individual may bring an action for specific performance of the obligation described in subparagraph (E). The relief shall be in addition to any other remedies provided under Federal or State law.

(3) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because an employer provides a bona fide employee benefit plan or plans under which long-term disability benefits received by an individual are reduced by any pension benefits (other than those attributable to employee contributions)—

(A) paid to the individual that the individual voluntarily elects to receive; or

(B) for which an individual who has attained the later of age 62 or normal retirement age is eligible.

(m) Voluntary retirement incentive plans

Notwithstanding subsection (f)(2)(B) of this section, it shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because a plan of

an institution of higher education (as defined in section 1001 of title 20) offers employees who are serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) supplemental benefits upon voluntary retirement that are reduced or eliminated on the basis of age, if—

(1) such institution does not implement with respect to such employees any age-based reduction or cessation of benefits that are not such supplemental benefits, except as permitted by other provisions of this chapter;

(2) such supplemental benefits are in addition to any retirement or severance benefits which have been offered generally to employees serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure), independent of any early retirement or exit-incentive plan, within the preceding 365 days; and

(3) any employee who attains the minimum age and satisfies all non-age-based conditions for receiving a benefit under the plan has an opportunity lasting not less than 180 days to elect to retire and to receive the maximum benefit that could then be elected by a younger but otherwise similarly situated employee, and the plan does not require retirement to occur sooner than 180 days after such election.

42 U.S.C. § 1981a

Damages in Cases of Intentional Discrimination in Employment

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e–5, 2000e–16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C. 2000e–2, 2000e–3, 2000e–16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e–5, 2000e–16] (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate

impact) under section 791 of title 29 and the regulations implementing section 791 of title 29, or who violated the requirements of section 791 of title 29 or the regulations implementing section 791 of title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(3) Reasonable accommodation and good faith effort

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 [42 U.S.C. 12112(b)(5)] or regulations implementing section 791 of title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. 2000e–5(g)].

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

(4) Construction

Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title.

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section—

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

(d) Definitions

As used in this section:

(1) Complaining party

The term "complaining party" means—

(A) in the case of a person seeking to bring an action under subsection (a)(1) of this section the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

(B) in the case of a person seeking to bring an action under subsection (a)(2) of this section, the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 794a(a)(1) of title 29, or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 [42 U.S.C. 12111 et seq.].

(2) Discriminatory practice

The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a) of this section.

42 U.S.C. § 2000e-3(a)

Other Unlawful Employment Practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-5(g)

Enforcement Provisions

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex,

or national origin or in violation of section 2000e–3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e–2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e–2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

42 U.S.C. § 12112(a)

Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a) (2007)

Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12203(a)

Prohibition against retaliation and coercion

(a) Retaliation

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

Appendix J

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:08-CV-1337-B

NAIEL NASSAR, MD,

Plaintiff,

v.

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, PARKLAND HEALTH & HOSPITAL SYSTEM, BETH LEVINE, M.D., AND J. GREGORY FITZ, M.D.

Defendants.

May 3, 2010

PROPOSED JURY CHARGE

GENERAL INSTRUCTIONS FOR THE JURY[1]

MEMBERS OF THE JURY:

* * *

SECOND CLAIM – RETALIATION[7]

Plaintiff claims he was retaliated against for engaging in activity protected by Title VII – namely, that UT Southwestern objected to his employment by Parkland and Parkland refused to hire him because he reported being subject to discrimination in his resignation letter. UT Southwestern and Parkland deny Plaintiff's claims and contend that each had legitimate, non-retaliatory reasons for their actions, which were wholly unrelated to Plaintiff's claim of discrimination in his resignation letter. It is unlawful for an employer to retaliate against an employee for engaging in activity protected by Title VII. To prove unlawful retaliation with respect to each Defendant, Plaintiff must prove by a preponderance of the evidence (1) that UT Southwestern objected to Plaintiff's employment by Parkland because of his complaints of discrimination in his resignation letter

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[1] Unless otherwise stated, these instructions are based on the Fifth Circuit Pattern Jury Instructions – Civil (2006). Defendant is the University of Texas Medical Center at Dallas since the claims against the individually-named defendants, Dr. J. Gregory Fitz and Dr. Beth Levine, have been dismissed by order of this Court. *See* Doc. # 99.

[7] Plaintiff's proposed jury charge correctly omits retaliation as a claim since the Court's order granting summary judgment for Parkland Hospital effectively extinguishes recovery on this same claim against Defendant. *See* Doc. # 100at 9-10, finding no "adverse employment action."

and (2) that Parkland refused to hire Plaintiff for the same reason. Plaintiff does not have to prove that unlawful retaliation was the sole reason for Defendant's actions. If you find Plaintiff's complaints of discrimination was a motivating factor in Defendants' actions, even though other considerations were factors, then you must determine whether Defendants proved by a preponderance of the evidence they would have taken the same actions even if Plaintiff had not complained of discrimination. [*BUT SEE* ED. NOTE BELOW RE MIXED MOTIVE IN RETALIATION CASES.[8]][9]

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[8] ED. NOTE: There is an argument that this instruction conflicts with Fifth 8 Circuit law regarding causation in Title VII retaliation claims, but the law is unsettled, with conflicting unpublished opinions. *Compare Newsome v.Collin County Community College Dist.*, 189 Fed. Appx. 353, 355 (5th Cir. 2006) ("The ultimate determination in an unlawful retaliation case is whether the conduct protected by Title VII was a 'but for' cause of the adverse employment decision. Even if retaliation was a motivating factor in [plaintiff's] termination, no liability for unlawful retaliation arises if the employee would have been terminated even in the absence of the protected conduct.'") (quotations and citations omitted), *with Block v. Kelly Servs., Inc.*, 197 Fed. Appx. 346, 348-49 (5th Cir.2006) (stating mixed-motives analysis applies to retaliation cases). Furthermore, in its published opinions, the Fifth Circuit has not expressly extended the "mixed motive" analysis applicable in Title VII discrimination claims to retaliation claims, *see Staten v. New Palace Casino, LLC*, 187 Fed. Appx. 350, 362 (5th Cir. 2006), and has found fundamental error with jury instructions that use the "motivating factor" language, although in a case where the parties agreed that mixed-motive did not apply. *See Septimus v. Univ. Houston*, 399 F.3d 601, 607 n.7, 608-09 (5th Cir. 2005). However, opinions from the Northern District of Texas have held that the mixed motive theory can apply in Title VII retaliation cases and have allowed jury instructions to that

Question No. 3a

Did UT Southwestern object to Plaintiff's employment by Parkland because he reported being subject to discrimination in his resignation letter? Answer "Yes" or "No." If your answer is "Yes," proceed to Question 3b. If your answer is "No," do not answer the next question.

Question No. 3b

Has UT Southwestern proven that it would have objected to Plaintiff's employment with Parkland even if he had not reported being subject to discrimination in his resignation letter? Answer "Yes" or "No."

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effect. *See Smith v. Xerox Corp.*, 584 F.Supp.2d 905, 912 (N.D. Tex. 2008).

[9] The Fifth Circuit Pattern Jury Instructions recommend the following instruction here: "If you disbelieve the reason(s) Defendant has given for its decision, you may infer Defendant [ultimate employment action] Plaintiff because [he/she] engaged in protected activity." This instruction is contrary to Fifth Circuit law by suggesting that the jury may infer retaliatory intent without any supporting evidence. *See Memberu v. Allright Parking Systems Inc.*, 93 Fed. Appx. 603, 610 (5th Cir. 2004) ("While it is true that a jury could disbelieve [defendant's] witnesses, this does not relieve [plaintiff] of his burden of proffering evidence from which a reasonable jury could infer intentional discrimination.") (§1983 discrimination claim); *Pineda v. United Parcel Service, Inc.*, 360 F.3d 483,487 (5th Cir. 2004) ("the plaintiff must offer 'some evidence ... that permits the jury to infer that the proffered explanation was a pretext for discrimination. The trier of fact may not simply choose to disbelieve the employer's explanation in the absence of any evidence showing why it should do so.'") (quoting *Swanson v. General Services Admin.*, 110 F.3d 1180, 1185 (5th Cir.1997))

Question No. 4a

Did Parkland refuse to hire Plaintiff's because he reported being subject to discrimination in his resignation letter? Answer "Yes" or "No." If your answer is "Yes," proceed to Question 4b. If your answer is "No," do not answer the next question.

Question No. 4b

Has Parkland proven that it would have refused to hire Plaintiff even if he had not reported being subject to discrimination in his resignation letter? Answer "Yes" or "No."

* * *

Appendix K

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:08-CV-1337-B

NAIEL NASSAR, MD,

Plaintiff,

v.

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, PARKLAND HEALTH & HOSPITAL SYSTEM, BETH LEVINE, M.D., AND J. GREGORY FITZ, M.D.

Defendants.

May 24, 2010

JURY TRIAL

Before: The Honorable Jane J. Boyle
United States District Judge

CERTIFIED TRANSCRIPTION
I, Shawnie Archuleta, CCR/CRR, certify that the foregoing is a transcript from the record of the proceedings in the foregoing entitled matter.

/s/

July 30, 2010

Transcribed by: Shawnie Archuleta,
TX CCR No. 7533
1100 Commerce Street Dallas,
Texas 75242

Proceedings reported by mechanical stenography, transcript produced by computer.

* * *

(In open court.)

THE COURT: Good morning. We are here to look one more time at the charge and make some final conclusions. We made the changes we talked about Friday, and so let me call on the plaintiff first.

MR. WALKER: We had no additional changes.

THE COURT: And I apologize, for the record, your last name is?

MR. WALKER: Brent Walker.

THE COURT: Mr. Walker, thank you very much. Mr. Gibson, come around, please.

MR. GIBSON: Thank you, Your Honor. Since Friday, we have had a little bit of time to go and look a little more closely into some case law and just have a few additional comments on the charge.

THE COURT: Take me to the pages when you get to the arguments

MR. GIBSON: The first comment is the mixed motive defense for both constructive discharge and retaliation --

THE COURT: On page?

MR. GIBSON: -- which we would add -- on page 8 -- at the end of the constructive discharge claim and on page 10 at the end of the retaliation claim.

* * *

MR. GIBSON: Your Honor, if I may, Kanida v. Gulf Coast Medical Personnel, 363 F.3d 568, 5th Circuit 2004, quotes: This court has consistently held that district courts should not frame jury instructions based upon the intricacies of the McDonnell Douglas burden shifting analysis.

Your Honor, if I may, I think this is exactly the burden shifting. It talks about a motivating factor, and then it talks about whether or not the employee articulates a reason, and then whether or not the plaintiff has proved that that is merely a pretext.

If it's not the burden shifting analysis, maybe I'm confused and the Court can explain where this instruction comes from.

THE COURT: This is your time to talk. Tell me what you want.

MR. GIBSON: Yes, Your Honor. Those two paragraphs should be stricken.

THE COURT: Okay. Before we go any further with that -- and I am somewhat more than dismayed that we were here from 1:15 until 5:30 on Friday, and you had every opportunity to bring this up, and you spent the weekend now researching. It's 8:30, and the jury is going to be here, and now we are hearing a whole new list or litany of things that you want in this charge. It's somewhat a little bit more than

dismaying. I don't want to hear from you, I just want to hear from Mr. Walker on his position.

MR. WALKER: Your Honor, our position on that is I believe it goes to the pattern jury charge. And beyond that, I agree with the Court that, after the charge conference on Friday, to change the metrics of the case, the case is going to be argued to the jury here in the next 30 minutes, and to change those at this point in time is late and, quite frankly, prejudicial to us, to bring up these new cases at the last moment and arguing something in the pattern jury charge of something that's not supposed to be in front of the jury.

THE COURT: All right. I will take a look at the pattern. My position is, one, that you probably have waived this; but assuming you haven't waived it, if it's part of the pattern, it's going to stay in. Now, if you would, one more time, is there anything else on this page that you are asking to have changed, Mr. Gibson?

MR. GIBSON: Your Honor, if I may very quickly.

THE COURT: Yes or no.

MR. GIBSON: Yes, the addition of the affirmative defense.

THE COURT: Read that for me.

MR. GIBSON: If you find plaintiff's race, religion or national origin was a motivating factor in the defendant's conduct, even though other considerations were factors in those actions, then you must determine whether the defendant proved by a preponderance of the evidence it would have engaged

in the same conduct even if the defendant had not considered plaintiff's race, religion or national origin.

THE COURT: All right. Is there anything else on page 8?

MR. GIBSON: To be fair, Your Honor, I think we made these objections last week.

THE COURT: You did not make this Friday afternoon, Mr. Gibson. This is new language, a new request. If it wasn't, I don't know why you would be bringing it up this morning, because I thought we covered everything in detail Friday afternoon. Don't talk while I'm talking. Do you understand me?

MR. GIBSON: Yes, Your Honor.

THE COURT: Okay. I don't want to hear that. I just want to hear what you want. Don't try to defend that you are not bringing up new things. If you are not, why are you bringing it up? Tell me what else you have on page 8.

MR. GIBSON: The only other comment I would have on page 8 is, the end of the last paragraph, we would strike the last few words, or to prove pretext, because we think that should be -- the context of pretext should be stricken from the charge.

THE COURT: What paragraph are you on?

MR. GIBSON: The final paragraph prior to Question 1 on page 8.

THE COURT: You want the whole paragraph out?

MR. GIBSON: No, Your Honor, I apologize. It's the last four words of the paragraph, which are, or to prove pretext.

THE COURT: All right. Let's move to your next request.

MR. GIBSON: On page 9, this is a comment we made last week. Just restating it, we would request that the line that says: First, that he engaged in protected activity, that that be qualified and that it state that he engaged in protected activity on or after April 27, 2006.

THE COURT: You have covered that objection. It's overruled.

MR. GIBSON: Thank you, Your Honor.

THE COURT: Don't repeat the objections from Friday. Today is just to see if you have something new. All right?

What else do you have that's different from Friday, because I ruled on those.

MR. GIBSON: The same two paragraphs, starting on the bottom of page 9 -- the last full paragraph on the bottom of the page on 9: Plaintiff may prove the defendant, that paragraph and the following paragraph are, again, the discussion of the McDonnell Douglas burden shifting, which we would argue should not be in the charge. THE COURT: And what case do you have that supports this position that you are giving me this morning?

MR. GIBSON: Yes, Your Honor.

THE COURT: What case?

MR. GIBSON: The Kanida case. Should I give you the cite?

THE COURT: I think you have given it to me.

MR. GIBSON: And the Walther v. Lone Star Gas Company, 952 F.2d 119, 5th Circuit 1992. 5th Circuit stating, quote, instructing the jury on the elements --

THE COURT: I just need the cites.

MR. GIBSON: Yes, Your Honor.

THE COURT: Tell me what else you've got.

MR. GIBSON: Finally, we would request that the blocking or objected to language should be changed to opposed or opposing.

THE COURT: Tell me where you are.

MR. GIBSON: Yes, Your Honor. Page 10 and the question.

THE COURT: Yes. And you brought this up Friday, did you not?

MR. GIBSON: Yes, I did, Your Honor.

THE COURT: Okay.

MR. GIBSON: I think those are our only additional comments.

THE COURT: Mr. Hagen, do you support this new theory on objections here 20 minutes before the jury is supposed to be here? We spent Friday afternoon, from 1:15 until 5:30, going over these objections. Do you support this, coming in here the last minute and pulling the rug out from under us? This could take me another hour, hour and a half to get this done and make that jury wait.

MR. HAGEN: Your Honor, I have to stand by the request that the defendant is making.

THE COURT: It's unprofessional, in my view, that you are pulling this on us Monday morning after we planned and worked on this all Friday afternoon, Mr. Gibson. That's all I need. Just take a seat, and I will tell you where I stand on this.

I haven't heard anyone cite yet the Smith v. Xerox Corporation case, 602 F.3d 320. In that particular case, the 5th Circuit came out with a opinion supporting Judge Godbey in part on this issue of motivating factor versus sole but for test; in addition, addressed the issue of pretext versus mixed motive. In conclusion and to summarize, the court found that the mixed motive analysis still applies in a Title VII retaliation case, distinguishing the Gross case and the other cases, in some part at least, because they were based on the ADEA, which the text of the statute seems to bear some distinction or the court has found some distinction in that type -- in that statutory language versus the language in the Title VII.

The specific language that I think supports the jury instructions as they are is at page 333: The choice of jury instruction depends simply on a determination of whether the evidence supports a finding that the just one or more than one factor actually motivated the challenge decision. Put another way, if the district court has before it substantial evidence supporting a conclusion that both legitimate and illegitimate more than one motive may have played a role in the challenged employment action, the Court may give a mixed motive instruction.

In this particular case, the overwhelming theory of both cases and the way this case has been presented is that one side believes that these actions that they allege were illegitimate were taken on the basis of the race and national origin and otherwise of the plaintiff.

The defense has put forth a strong defense with regard to the fact that it was some legitimate reason, primarily, at least, it appears, based upon this affiliation agreement. And so I think it's very clear -- and I could probably spend a day going through the different pieces of evidence that establish these two competing theories of the case that clearly I think make this case fall within the mixed motive as opposed to pretext case.

So anything that's been requested by the defense by way of pretext, relying upon Rachid or Septimus, is not, I think, well-founded in the law at this point, at least based upon the Xerox case. And it remains to be seen what the Supreme Court does with this mixed motive issue once they look at it in the context of a Title VII, but they haven't.

What I am going to do is spend some time looking at the new objections by the defense and making a decision if it should be -- the jury charge should be changed or not, and I will let you all know as soon as I figure that out, and I will let you know if we have to make the jury wait.

* * *

(Jury enters courtroom)

THE COURT: Ladies and gentlemen we are going to pass out the jury instructions, and I will read those to you as soon as everyone gets a copy.

(Jury instructions read to the jury)

THE COURT: I have the original jury charge here that is signed in blue ink, and that's the one I will ask you to sign. I need to get actually the verdict form back to you on this original, and I will do that.

Ladies and gentlemen, the case is now yours. Please follow the instructions on the deliberations. Wait until you are all back there. You just go back and elect your foreperson, let us know, and I'm going to be making sure we have all the exhibits exactly as they were admitted, ready and organized to send back to you. That may take me a few minutes. Let us know what your lunch schedule might be so I will know who needs to be here when. And when we take a break is obviously when you guys take a break. With that, good luck.

(Jury leaves courtroom)

* * *

Appendix L

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:08-CV-1337-B

NAIEL NASSAR, MD,

Plaintiff,

v.

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, PARKLAND HEALTH & HOSPITAL SYSTEM, BETH LEVINE, M.D., AND J. GREGORY FITZ, M.D.

Defendants.

May 21, 2010

JURY TRIAL

Before: The Honorable Jane J. Boyle
United States District Judge

CERTIFIED TRANSCRIPTION

I, Shawnie Archuleta, CCR/CRR, certify that the foregoing is a transcript from the record of the proceedings in the foregoing entitled matter.

/s/

July 30, 2010

Transcribed by: Shawnie Archuleta,
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Proceedings reported by mechanical stenography, transcript produced by computer.

* * *

MR. HAGEN: I understand that. Thank you for the clarification as to the denial of that request. And if the Court does see fit to include the specifically or the objecting to by the University, I think that can help the jury understand what it is that they are being asked to decide whether or not was, you know, an adverse employment action.

THE COURT: And I'm going to put that in there.

MR. HAGEN: The other thing on this question, then, is, I think we are entitled to an affirmative defense on this retaliation theory. And I think it says, essentially, would the defendant have objected to the plaintiff's job change or job application to work at Amelia Court Clinic for Parkland even in spite of the conversation on or about April 27 with Greg Fitz.

THE COURT: What case are you relying upon for this? Is this this pretext-plus line of cases, Septimus and Rachid?

MR. HAGEN: I think if an affirmative defense is pled for retaliation, I think we are just entitled to it.

THE COURT: Well, I am not -- I will look at this. And I know that Septimus has some language about following a prior panel decision and pretext plus does, but I'm not sure the way you are phrasing it

that it is correct as a matter of law. Here, it is a motivating factor. We say, because of it the law is a motivating factor. It doesn't have to be the sole reason, it doesn't have to be but for. Everyone I think agrees on that.

So what you are telling me is that you want some language in there that indicates that, if you find they would have done it anyway, which goes way back to Price Waterhouse, and I'm not sure it is a correct statement of the law because -- I'll look at it.

MR. HAGEN: I think in the absence of an affirmative defense, then, Septimus, I think, says it's clear error -

THE COURT: I know what it says.

MR. HAGEN: -- to omit something that says essentially sole cause.

THE COURT: Well, I think we answer that by putting in there only motive. It does not have to prove retaliation was the only motive, but must prove the defendant acted at least in part to retaliate.

MR. HAGEN: But that is -- that gives them leeway as opposed to the defendant a sort of a exclusivity entitlement there.

THE COURT: How do the two square?

MR. HAGEN: Well, I think the -- well, I think that the defendant -- the plaintiff must show that it is the sole motive of the defendant. Well, under but for language, I'm wondering in the language of Septimus, I think that it's something more confining, it's something more stringent than motivating factor.

THE COURT: All right. I understand what you are asking for, and I will look at the law on this and make sure this is correct. But my understanding is, we are still at motivating factor for retaliation. If that wasn't the case, then, this instruction that says, plaintiff doesn't have to prove that retaliation was the only motive, would be incorrect.

MR. HAGEN: Correct. And --

THE COURT: You're taking the position it's a but-for.

MR. HAGEN: Yes, we are, under Septimus. And as for constructive discharge, I think we've covered the main points for retaliation.

* * *

THE COURT: Couple of things: I moved the language on the business judgment to where everyone agreed to move it. Just with regard to Mr. Gibson, your points on this being a pretext case and somehow warranting this kind of but for causation under Septimus, I deny those requests. I don't think that this is what we would define as a pretext case. In any event, I don't think it's the defense's call to describe a case as a pretext case or not. This has been tried as a mixed motive case.

There is a very helpful case that I think really clears up the confusion -- and there's plenty of it under Septimus and Rachid on this point -- and that is written by Judge Godbey. It is probably one of the most well-written opinions on these points that I have found. Smith v. Xerox, 584 F.Supp.2d 905, and he cites to an unpublished 5th Circuit case. It's much

more slim than his, Block v. Kelly Services, and that's 2006 Westlaw 2571012.

The bottom line is that the would have done it anyway defense has been completely taken out of the statute -- I mean of the case authority, the Supreme Court case authority, as intended by the changes to the statute. To the extent that it's in the case -- it's not in this case, and this case is a mixed motive retaliation case, which calls for -- and I think has been verified by the 5th Circuit and certainly as explained by Judge Godbey in this case -- calls for a motivating factor; that the discriminatory intent is a motivating factor, it doesn't have to be the sole motivating factor.

Therefore, you wouldn't be entitled to this would have done it anyway type of defense or sole motivating factor type of defense that you have asked for, so I am denying that request.

I want to make sure I have covered most of the objections, because I want to get started at 9:00.

* * *

Appendix M

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:08-CV-1337-B

NAIEL NASSAR, MD,

Plaintiff,

v.

UT SOUTHWESTER HEALTH SYSTEM ET AL.,

Defendants.

May 24, 2010

RESPONSE TO JURY NOTE # 1

Members of the Jury:

Members of the Jury, I received the following note (No. 1) signed by your Foreperson,

We are looking for an email from Dr. Nassar to Dr. Fitz when he first complained about discrimination or being treated differently.

Thank you

Randy Cole

Response:

All of the exhibits admitted during the trial have been delivered to the jury room for your deliberations.

SIGNED: May 24, 2010.

/s/ _____
JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

OPPOSITION BRIEF

RECORD
AND
BRIEFS

No. 12-484

IN THE
Supreme Court of the United States

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER,
Petitioner,

v.

NAIEL NASSAR, M.D.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner waived its objection to a mixed-motive jury instruction with regard to respondent's Title VII retaliation claim, and, if not, whether the mixed-motive framework applies to Title VII retaliation claims.

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INTRODUCTION

The question presented in the petition is whether this Court's decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2006), which held that the mixed-motive framework does not apply to claims brought under the Age Discrimination in Employment Act (ADEA), bars the use of that framework in Title VII retaliation cases. Before this Court could reach that issue in this case, however, it would first need to decide whether petitioner University of Texas Southwestern Medical Center (UTSW) waived its objection to the mixed-motive jury instruction—a fact-bound question never decided below. If the waiver issue were resolved against UTSW—and the record and opinions below suggest that it would be—this Court would never reach the Title VII issue. Thus, this case is a poor vehicle for addressing the question presented in the petition.

Moreover, the courts of appeals are not divided on whether the mixed-motive framework applies to Title VII retaliation claims. Only two circuits have addressed the question since *Gross*, and both answered in the affirmative. Petitioner claims a circuit split by citing cases from three circuits that interpret other statutes, two of which expressly distinguish Title VII. In any event, because the jury rejected UTSW's claim that it would have taken the same action even without a retaliatory motive, the outcome of this case would almost certainly be the same even if the Title VII issue were decided in UTSW's favor.

STATEMENT OF THE CASE

Factual Background

1. Dr. Naiel Nassar, who is of Middle Eastern descent, was a faculty member at UTSW from 1995 to 1998, and from 2001 to 2006. Pet. App. 2. UTSW is

affiliated with Parkland Hospital, and UTSW faculty make up most of the Hospital's physician staff. *Id.* Nassar worked as the Associate Medical Director of Parkland's Amelia Court Clinic. *Id.*

Until 2004, Nassar worked at Parkland without incident. R. 2360. Nassar's immediate supervisor was Dr. Phillip Keiser, the Clinic's Medical Director. In June 2004, UTSW hired Dr. Beth Levine to be Keiser's supervisor at UTSW. Pet. App. 2-3. Levine was responsible for overseeing the Amelia Clinic, but did not work there on a daily basis. *Id.* at 3.

Even before Levine began working at UTSW, she treated Nassar differently than his colleagues. Before she was hired, she interviewed the faculty who would be under her supervision. R. 2926-28. When Nassar met with Levine, he expected an informal fifteen to twenty minute meeting, as Levine had held with other members of the staff. *Id.* Instead, Levine questioned Nassar for an hour and a half, reviewing every detail of his resume and reading from a long list of pre-written questions that she asked of no one else. *Id.*

Once Levine started at UTSW, she became irrationally convinced that Nassar was not working as hard as the other doctors. Pet. App. 3; R. 2360-62. She expressed concern to Keiser about Nassar's productivity, much more so than she did about any other doctor. Pet. App. 3. When Keiser presented Levine with objective data demonstrating Nassar's high productivity and effectiveness, Levine began criticizing Nassar's billing practices. *Id.* Her criticism did not take into account the fact, of which Levine was aware, that Nassar's salary was funded by a federal grant that precluded billing for most of his services. *Id.* On a number of occasions, Nassar met with Dr.

Gregory Fitz, UTSW's Chair of Internal Medicine and Levine's supervisor, to complain about Levine's unwarranted and unusual scrutiny. *Id.* at 4.

In late 2005, when UTSW considered hiring Muhammad Akbar, another doctor of Middle Eastern descent, Levine said in Nassar's presence that "Middle Easterners are lazy." Pet. App. 3. Levine successfully opposed the hiring of Akbar to the UTSW/Parkland staff. *See* R. 2383-2400. After Parkland hired Akbar independently of UTSW, Levine remarked in Keiser's presence that the Hospital had "hired another one." Pet. App. 3. Keiser took "another one" to mean "another person . . . who is Muslim and who is dark-skinned." R. 2400.

2. Levine's attitude and behavior led Dr. Nassar to look for a way to escape Levine's supervision. Pet. App. 4. Although he wanted to do so while continuing to work at the Amelia Clinic, he testified that the harassment was severe enough that he would have resigned from UTSW even if it meant he had to leave Parkland. *Id*; R. 2962-63. Parkland staff told Nassar that if he resigned from his UTSW position, the Hospital would hire him to continue working at the Clinic. Pet. App. 5. On June 3, 2006, Parkland offered Nassar a job as a staff physician on Parkland's payroll, starting on July 10. *Id.*

Dr. Nassar resigned from UTSW on July 3. *Id.* In his resignation letter to Dr. Fitz and other UTSW faculty, Nassar wrote that "[t]he primary reason of my resignation is the continuing harassment and discrimination against me by . . . Dr. Beth Levine." *Id.* Levine's behavior, he wrote, "stems from religious, racial and cultural bias against Arabs and Muslims that has resulted in a hostile work environment." *Id.*

Fitz moved to block Parkland from hiring Nassar, asserting that UTSW had a right to staff Parkland with university faculty. *Id.* As a result, Parkland withdrew its offer to Nassar. *Id.* at 5-6. Nassar later accepted a position at a smaller clinic in Fresno, California. *Id.* at 6.

Proceedings Below

1. Dr. Nassar filed a charge with the EEOC, which found "credible, testimonial evidence" that UTSW had retaliated against Nassar for his allegations of discrimination. Pl. Trial Ex. 78. Nassar filed suit, alleging, as relevant here, that UTSW constructively discharged and retaliated against him in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. Pet. App. 6.

On May 3, 2010, UTSW submitted proposed jury instructions that included a mixed-motive charge on Nassar's retaliation claim. *Id.* at 103-04. In a footnote, UTSW incorrectly stated that Fifth Circuit law on the causation standard was "unsettled," citing two unpublished decisions. *Id.* at 104 n.8. The footnote failed to cite the Fifth Circuit's decision in *Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010), decided more than a month earlier, which held that a mixed-motive instruction was appropriate in Title VII retaliation cases. Thus, although UTSW thought that the law was "unsettled," it nonetheless proposed a mixed-motive instruction, which was consistent with *Smith*.

The case was bifurcated into liability and relief phases and tried to a jury. Pet. App. 6. On Friday, May 21, after the close of the evidence in the liability phase, the district court held a charge conference that lasted the entire afternoon. R. 3283-3325. UTSW did not

object to the mixed-motive instruction. At the conclusion of the conference, the court announced the end of the period for objections: "Anything else? I'm telling you now, no new objections." R. 3324; Pet. App. 61 (Elrod, J., concurring in denial of rehearing).

On Monday, May 24, just before the jury was to be charged, UTSW attempted to raise a new objection to the mixed-motive charge, explaining that "we have had a little more time to go and look a little more closely into some case law." Pet. App. 108; *see* R. 3330-52. The district court stated that UTSW "probably ha[d] waived" the objection and that the court found it "a little more than dismaying" and "unprofessional" to raise a new objection after failing to do so during the charge conference. Pet. App. 109-10. The court instructed the jury on a mixed-motive theory on the retaliation claim. *Id.* at 47-48.

The jury returned a verdict for Nassar, finding that Nassar's resignation from UTSW was the result of a constructive discharge and that UTSW blocked Parkland from hiring Nassar in retaliation for Nassar's complaints of discrimination. *Id.* at 6, 47-48; R. 3309.

For the relief phase, the district court instructed the jury on an affirmative defense—that if the evidence showed that UTSW would have stopped Parkland from hiring Nassar even without a retaliatory motive, then UTSW would not be liable for damages. Pet. App. 42. UTSW had claimed at trial that Fitz made his decision to block Parkland from hiring Nassar in April 2006, before Nassar sent his resignation letter. *Id.* at 5, 11. Indeed, in the petition UTSW claims that such evidence was "undisputed." Pet. 2, 26. But Keiser testified to a conversation with Fitz two or three days after Fitz received Nassar's resignation letter. Pet.

App. 5,11. According to Keiser, the letter shocked Fitz, who felt that Levine should be publicly exonerated from the charges, and therefore resolved to stop Parkland from hiring Nassar. *Id.* Nassar also offered evidence that UTSW's interpretation of its agreement with Parkland was implausible and that, in fact, Parkland hired physicians who were not UTSW faculty members. *Id.* at 4-5.

In any event, Nassar's protected activity was not limited to the resignation letter. Fitz had been aware of Nassar's complaints about Levine's harassment because Nassar complained to Fitz about Levine's behavior several times in late 2005 and early 2006. *Id.* at 4. And Nassar offered evidence that Fitz blocked the employment not only because of the resignation letter, but also because of the earlier complaints. *See* R. 3309 (the district court rejecting UTSW's request that the jury instructions limit the protected activity to the resignation letter).

The jury agreed with Nassar and expressly rejected UTSW's affirmative defense. That is, the jury found that UTSW would not have blocked Nassar's hiring at Parkland but for its retaliatory motive. Pet. App. 43-44. The jury awarded Nassar $436,168 in back pay and $3,187,500 in compensatory damages. *Id.* The district court reduced the damages to $300,000 in accordance with Title VII's compensatory damages cap. *Id.* at 7.

2. UTSW appealed, and the Fifth Circuit upheld the verdict in part. The court of appeals reversed the constructive discharge verdict, holding that although "Nassar proved that Levine racially harassed him," he did not prove an aggravating factor necessary for constructive discharge. *Id.* at 10. But the court upheld the retaliation verdict, holding that Nassar offered

sufficient proof that UTSW prevented Parkland from hiring Nassar "to punish Nassar for his complaints about Levine." *Id.* at 11. The court addressed the mixed-motive issue by noting that UTSW conceded that *Smith v. Xerox* was controlling, *id.* at 12 n.16, but the court did not decide whether UTSW waived the issue by failing to make a timely objection to the mixed-motive instruction. *Id.*

3. UTSW petitioned for rehearing en banc, asking the Fifth Circuit to overrule *Smith*. The court denied rehearing. Judge Elrod, a member of the original panel, concurred, noting that she "agree[ed] with the district court" that UTSW had waived its objection to the jury instruction by not submitting an alternate proposed jury instruction and by not raising the objection during the May 21 charge conference. *Id.* at 61-62. Judge Elrod stated that although the question was not necessary to the panel opinion—because UTSW conceded that its objection was foreclosed by *Smith v. Xerox*—it was "dispositive" of her decision to vote against rehearing en banc. *Id.*

Judge Smith dissented, urging the panel to address the waiver issue expressly, rather than passing on it "*sub silentio*," because of the importance of the underlying issue. *Id.* at 63. He stated that UTSW "[a]t least . . . presents a strong argument" that the issue was not waived and that the panel—on a motion for rehearing—could decide "one way or the other." *Id.* at 65 n.1. And he explained that it was necessary for the panel to decide the waiver issue because "UTSW is not entitled to raise a waived claim." *Id.* at 65.

REASONS FOR DENYING THE WRIT

I. This Case is a Poor Vehicle to Address The Title VII Question Because the Court Would First Have to Decide Whether UTSW Waived Its Objection to the Mixed-Motive Jury Instruction.

If the Court granted the petition to decide whether the mixed-motive framework applies to Title VII retaliation claims, it would first need to decide whether UTSW waived its objection to the relevant jury instruction. The waiver question is fact-intensive and was not decided by the panel below. If decided against UTSW, the waiver question would be dispositive of the case and would prevent this Court from reaching the Title VII issue. *See* Pet. App. 64-65 (Smith, J., dissenting from denial of rehearing) (noting the need to decide the waiver question because "UTSW is not entitled to raise a waived claim"). This case is therefore a poor vehicle to address the petitioner's question presented.

The court of appeals did not need to decide whether UTSW forfeited the issue because the panel decision was controlled by circuit precedent. Pet. App. 61 (Elrod, J., concurring in denial of rehearing). This Court, in contrast, would only reach the Title VII question if it decided the waiver issue in UTSW's favor. *See Adams v. Robertson*, 520 U.S. 83, 83 (1997) (dismissing as improvidently granted where issue was not properly presented to state court below); *Morrison v. Olson*, 487 U.S. 654, 669-70 (1988) (declining to consider issue that was forfeited in the district court and viewed as waived in the court of appeals); 9B Charles Alan Wright, et al., *Federal Practice and Procedure Civil* § 2472 (3d ed. 1998 & Supp. 2012)

(forfeiture rule is "not a mere technical formality and is essential to the orderly administration of civil justice.").

To preserve an objection, UTSW was required to state its objection distinctly on the record at the time established by the district court for such objections, and to submit in writing a proposed alternate instruction. *See* Fed. R. Civ. P. 51; *Kanida v. Gulf Coast Med. Pers. LP*, 363 F.3d 568, 580 (5th Cir. 2004) ("Failure to present a specific written instruction to the trial court bars a[] subsequent complaint on appeal that the instruction was not given."). UTSW met neither of these requirements.

UTSW paints a picture of perfect diligence, arguing that it submitted a proposed alternate instruction and raised its objection during the May 21 charge conference. Pet. 24-25. Neither assertion is accurate. UTSW's proposed instruction, submitted weeks before the charge conference, included a mixed-motive charge—the charge that it now seeks to contest. Pet. App. 103-04. Its footnote, far from "including a detailed presentation on the conflicting state of the law," as the petition describes it, Pet. 25, failed to even mention *Smith v. Xerox*, controlling authority decided over a month earlier. Pet. App. 104 n.8.

And UTSW did not raise its objection during the May 21 charge conference, as required by Federal Rule of Civil Procedure 51. The petition cherry-picks words from the transcript to make it appear that UTSW objected to the mixed-motive standard. *See* Pet. 24. In fact, the transcript shows that UTSW asked the district court for an instruction on an affirmative defense under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), that would prevent a finding of liability if

UTSW could prove it would have blocked Parkland's hiring of Nassar even without a retaliatory motive. *See* Pet. App. 118 ("I think we are entitled to an affirmative defense on this retaliation theory."); *id.* ("I think if an affirmative defense is pled for retaliation, I think we are just entitled to it."); *id.* at 119 ("I think in the absence of an affirmative defense . . .").[1]

At the end of the charge conference, in a portion of the transcript that UTSW does not reproduce in the petition appendix, counsel for UTSW stated that he "would like to just make some objections that we made previously just so they are on the record as to this jury charge." R. 3320. In the subsequent list of objections, UTSW's *only* reference to the retaliation mixed-motive charge was this: "We also object to the charge because it lacks the affirmative defense." *Id.* at 3322. Throughout the May 21 charge conference, UTSW was *requesting* a *Price Waterhouse* charge, not objecting to it.

Indeed, UTSW's depiction is belied by its later actions. If, as the petition argues, UTSW properly presented its objection in its proposed instructions and again at the Friday Rule 51 charge conference, then it would have not needed to object the following Monday morning, *after* the charge conference. *See* Pet. App. 111 (the district court making the same point). And it makes no sense for counsel to explain to the court that "we have had a little more time to go and look a little more closely into some caselaw" if he had previously raised the objection. *Id.* at 108. The only reasonable explanation is that UTSW raised a new issue, not one

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[1] For the full exchange, see R. 3310-25.

preserved in its proposed instructions and charge conference objections.

Thus, it is no surprise that, of the four judges to decide this case on the merits, at least two think that UTSW's objection is waived, *see id.* at 61 (Judge Elrod) & 109-10 (Judge Boyle), and the other two have never addressed the issue.

Because deciding this case would require the Court to resolve a predicate issue of fact that was not decided below, and because resolution of that issue would likely prevent this Court from reaching the merits of the Title VII question, the petition should be denied.

II. There Is No Circuit Split Regarding Whether Title VII Retaliation Claims Can Be Tried Under a Mixed-Motive Theory.

Only two circuits—the Fifth and the Eleventh—have considered whether Title VII retaliation claims may proceed under a mixed-motive theory after *Gross*. *Saridakis v. S. Broward Hosp. Dist.*, 468 F. App'x 926 (11th Cir. 2012); *Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010). Both have answered in the affirmative.

In *Smith*, the Fifth Circuit held that, in light of *Gross*'s admonition that courts "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination," 557 U.S. at 174 (citation omitted), and the Court's conclusion that Title VII decisions did not control interpretation of the ADEA, *id.* at 173-74, *Price Waterhouse* remained applicable to Title VII retaliation claims. *Smith*, 602 F.3d at 329. In the only other court of appeals decision on the issue, the Eleventh Circuit,

in an unpublished opinion, agreed with the Fifth Circuit. *Saridakis*, 468 F. App'x at 931.

In arguing that the circuits are split, UTSW relies exclusively on decisions interpreting *other* statutory schemes. *See Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312 (6th Cir. 2012) (Americans with Disabilities Act); *Palmquist v. Shinseki*, 689 F.3d 66 (1st Cir. 2012) (Rehabilitation Act); *Barton v. Zimmer*, 662 F.3d 448 (7th Cir. 2011) (ADEA); *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir. 2010) (Americans with Disabilities Act); *Fairley v. Andrews*, 578 F.3d 518 (7th Cir. 2009) (Section 1983).

These decisions do not conflict with the decision below. Indeed, the Sixth and First Circuits recognized that Title VII retaliation claims, arising under the same statutory scheme as *Price Waterhouse*, are different than claims arising under other statutes. The Sixth Circuit distinguished *Smith* as concerning "the use of a 'motivating factor' test in a different provision of *Title VII*." *Lewis*, 681 F.3d at 321 (emphasis in original). The First Circuit recognized similarly that "*Smith* dealt with a problem altogether different from the one that confronts us here"—whether to apply Title VII rules to the Rehabilitation Act. *Palmquist*, 689 F.3d at 75.

Perhaps anticipating this flaw in its argument, UTSW argues that the First and Seventh Circuits relied on earlier decisions interpreting Title VII. Pet. 12 (citing *McNutt v. Bd. of Trustees of the Univ. of Ill.*, 141 F.3d 706 (7th Cir. 1998), and *Speedy v. Rexnord Corp.*, 243 F.3d 397 (7th Cir. 2001)); *id.* at 16 (citing *Tanca v. Nordberg*, 98 F.3d 680 (1st Cir. 1996)). For example, the petition describes *McNutt* as holding that

Title VII retaliation cases could not be brought as mixed-motive claims. Pet. 12.

UTSW has it backwards. *McNutt*, 141 F.3d at 706, *Speedy*, 243 F.3d at 401-02, and *Tanca*, 98 F.3d at 682-83, each held that *Price Waterhouse* applies to Title VII retaliation claims. The courts all held that the mixed-motive discrimination *remedies* created by the 1991 Civil Rights Act were unavailable to Title VII retaliation plaintiffs. Once the employer carried its burden of showing that retaliation was not the but-for cause of the adverse action—*i.e.*, that the retaliation truly was mixed-motive—plaintiffs could not take advantage of the 1991 amendments that allowed for injunctive relief and attorney's fees in such circumstances. Instead, their claims were governed by *Price Waterhouse*'s rule that defendants were not liable at all. The three decisions are based on circumstances that arose after the plaintiff proved a *Price Waterhouse* motivating factor that shifted the burden to the employer to show that it would have taken the same action even without the retaliatory motive. As the Seventh Circuit noted, the application of *Price Waterhouse* to the retaliation claims in *McNutt* was "consistent with the Supreme Court's . . . decision in *Gross*." *Serwatka*, 591 F.3d at 963.

McNutt, *Speedy*, and *Tanca* thus do not conflict with *Smith* and *Saridakis*. Because both courts of appeals that have addressed the question presented in this case reached the same answer, this Court should deny review.

III. A Different Causation Standard Would Not Change the Outcome of This Case.

The Court normally denies review "[i]f the resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court[.]" Eugene Gressman et al., *Supreme Court Practice* 248 (9th ed. 2007). Because the outcome of this case almost certainly does not turn on the question presented in the petition, certiorari should be denied. *See The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959) (Court decides cases "in the context of meaningful litigation" because its function is "judicial, not simply administrative or managerial.").

In the relief phase of the trial, the district court instructed the jury that if UTSW showed that it would have prevented Parkland from hiring Nassar even without a retaliatory motive, UTSW would not be liable for damages. Pet. App. 42. The jury rejected the defense, finding that retaliation was the but-for cause of UTSW's actions. *Id.* at 43-44.

To be sure, if a mixed-motive theory did not apply, the burden of persuasion on the but-for question would shift to Nassar. But that distinction is of limited import, because it only matters where the evidence is balanced. *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2245 n.4 (2011); *accord* 21B Charles Alan Wright, et al., *Federal Practice and Procedure Evidence* § 5122 (2d ed. 2005 & Supp. 2012) (preponderance standard "applies only when the jury cannot make up its mind."). In this case, where the jury "heard conflicting evidence about the timing and motivation of Fitz's opposition" to Parkland's hiring of Nassar, Pet. App. 5, and "resolved the conflict against UTSW," *id.* at

11, shifting the burden of persuasion would not change the outcome.

The petition's assertion that its evidence on but-for causation was "undisputed," Pet. 2, 6-7, 26, is belied by the Fifth Circuit's opinion and the district court record, including, most importantly, the jury's express finding that unlawful retaliation was the but-for motivation for UTSW's adverse action.

IV. The Fifth Circuit's Interpretation of Title VII Is Correct.

Gross rested on the principle that courts "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." 557 U.S. at 167 (quoting *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008)). Because this Court was interpreting the ADEA, not Title VII, it stated that decisions such as *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), and *Price Waterhouse* were inapplicable. *Id.* at 175 & n.2.

As a result, the question facing the lower courts is not whether *Gross* controls the interpretation of Title VII of its own force. It clearly does not. *See Palmquist*, 689 F.3d at 74 (*Gross* "[o]bviously" does not control interpretation of the Rehabilitation Act); *Lewis*, 681 F.3d at 321 (whether a mixed-motive theory may be brought in "a different provision of *Title VII*" is a different question). Rather, an interpreting court must account for Title VII's structure, context, and history. *See Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.").

When Congress set out to amend Title VII in 1991, it was aware of the Court's relevant decisions—indeed, the Act was "in large part . . . a response" to cases interpreting the 1964 Civil Rights Act. *Desert Palace*, 539 U.S. at 94 (citation omitted). And Congress knew that, without amendment, Title VII's retaliation provision would continue to be governed by the burden-shifting procedure outlined in *Price Waterhouse*, a decision interpreting identical language in the same statutory scheme. *See Gomez-Perez v. Potter*, 553 U.S. 474, 488 (2008) (Congress is "presumably familiar" with the Court's precedents and has "reason to expect" interpretation "in conformity" with them) (citation omitted). It follows that, by leaving the retaliation provision unamended, Congress intended to continue to permit mixed-motive claims. *See McNutt*, 141 F.3d at 709 ("Congress clearly stated its decision to overrule *Price Waterhouse* only with respect to [discrimination claims] and did not make a similar provision for retaliation claims[.]"); H.R. Rep. No. 102-40(II) (1991), *reprinted in* 1991 U.S. Code Cong. & Admin. News 694, 709-10 ("Section 5 overturns one aspect of the Supreme Court's decision in *Price Waterhouse v. Hopkins*[.]").

Moreover, the discrimination and retaliation provisions—enacted by the same Congress in the same statute and using identical causation language—are inherently interrelated. *See Gomez-Perez*, 553 U.S. at 481 (rejecting the argument that "a claim of retaliation is conceptually different from a claim of discrimination"); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173-74 (2005) ("Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination."). Applying the mixed-motive

framework to Title VII retaliation claims not only accords with precedent, but also, by retaining a uniform standard for Title VII claims, "ensure[s] that the statutory scheme is coherent and consistent." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 222 (2008).

Thus, although this case would not be an appropriate one in which to consider the issue, Title VII's text, history and context confirm that the Fifth Circuit was correct to hold that mixed-motive theories remain available for Title VII retaliation claims after *Gross*.

CONCLUSION

The petition for a writ of certiorari should be denied.

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REPLY BRIEF

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BRIEFS

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In the
Supreme Court of the United States

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER,

PETITIONER,

v.

NAIEL NASSAR, M.D.,

RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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INTRODUCTION

Whether the federal employment statutes generally require a plaintiff to prove but-for causation under *Gross v. FBL Financial Services*, 557 U.S. 167 (2009) — or instead to show only that the employer had a mixed motive under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) — is an exceptionally important question that recurs frequently and has percolated thoroughly in the courts of appeals. Nassar does not dispute these points, which suffice by themselves to warrant a grant of *certiorari*.

Nor does Nassar dispute that numerous appellate judges, district judges, and commentators have acknowledged a deepening circuit split on this question. Nassar argues there is no circuit split if one considers only Title VII's retaliation provision in isolation. But the question presented concerns the general rule for *all* of the employment statutes that do not specifically address mixed motives, which is one of the reasons the question is so important. Nassar points to no material distinction in the relevant statutes, and there is none.

Now that this issue has received such extensive consideration in the lower courts and the academy, the Court should grant review to determine which of its own precedents governs the question.

I. THE QUESTION PRESENTED IS PROPERLY BEFORE THIS COURT.

Nassar's attempt to avoid the question presented by focusing heavily on waiver is telling, but misplaced. Everyone appears to agree that the

Medical School raised its objection on the record at least once before the closing arguments and jury instructions, and that both lower courts passed upon the objection. For each of these reasons, the issue is properly presented. Pet. 23–25.

As the petition explains, this Court reviews issues that were either pressed or passed upon in the court of appeals. Pet. 23 (citing *United States v. Williams*, 504 U.S. 36, 41 (1992)). The court of appeals addressed the question on its merits, "find[ing] no error" in the relevant jury instructions in light of that court's earlier decision in *Smith v. Xerox*, 602 F.3d 320 (5th Cir. 2010). Pet. App. 12 n.16. Thus, "even if this were a claim not raised by petitioner below, [this Court] would ordinarily feel free to address it since it was addressed by the court below." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *accord United States v. Wells*, 519 U.S. 482, 488 (1997); *Williams*, 504 U.S. at 41; *Stevens v. Dep't of Treasury*, 500 U.S. 1, 8 (1991); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099, n.8 (1991).

Nassar emphasizes that the court of appeals chose *not* to address his waiver argument. Br. in Opp. 8. But that is the Medical School's point: just as in *Williams* and the other cases cited above, the court of appeals resolved the issue on the merits without addressing a waiver argument, and for that reason alone, the issue is now properly before this Court. Nassar ignores that well-established legal standard and cites a few irrelevant authorities: *Morrison v. Olson*, 487 U.S. 654, 669–70 (1988), in which the court of appeals considered the relevant

issue forfeited and did *not* pass upon it; *Adams v. Robertson*, 520 U.S. 83, 83 (1997), which applied the different standards applicable to this Court's jurisdiction to review *state court* decisions (*see also, e.g., McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 435–36 (1940)); and a provision from a civil procedure treatise that does not even address *this Court's* preservation standards, 9B Wright, et al., *Federal Practice and Procedure Civil* § 2472 (3d ed. 1998 & Supp. 2012).

In any event, it is undisputed that the Medical School raised its objection on the record on Monday, May 24, 2010, "just *before* the jury was to be charged." Br. in Opp. 5 (emphasis added); *see also, e.g., id.* at 10–11; Pet. App. 112 ("the burden shifting . . . should not be in the charge"); Pet. 23–25. By making that objection "before the instructions and arguments [we]re delivered," Fed. R. Civ. P. 51(b)(2) & (c), the Medical School preserved the objection in exactly the manner Rule 51 dictates. Nassar cites no authority, and the Medical School is aware of none, requiring anything more. Even the district court did not find or rely on waiver, though it did express displeasure with the timing of the objection. *See* Pet. App. 114; *see also* R. 3348 ("I guess I wouldn't necessarily fault you for it").[1]

Nassar's other arguments are beside the point because they relate only to a *third* reason the question presented is properly before this Court: the Medical School's earlier objection during the May 21,

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[1] The "R." citations refer to the record on appeal in the Fifth Circuit.

2010, charge conference. At the conference, the Medical School preserved the issue by arguing that "the plaintiff must show that [retaliation] is the sole motive of the defendant." Pet. App. 119; *see also* Pet. 24. Nassar essentially disputes whether that objection was sufficiently clear, or is best construed as advocating a third, middle-ground position. *See* Br. in Opp. 9–11. But the proof is in the pudding, because the district court itself understood at that time that the Medical School was "taking the position [that] it's but-for," and rejected the Medical School's position based on the court's "understanding" that the law "is still at a motivating factor for retaliation." Pet. App. 120; *see Memphis Cmty. School Dist. v. Stachura*, 477 U.S. 299, 305 n.6 (1986).

II. THE COURTS OF APPEALS ARE DIVIDED.

The reason for Nassar's heavy reliance on such a weak procedural argument is clear enough: this is a paradigmatic case for *certiorari*, as it presents an exceptionally important question of statutory construction on which the courts of appeals are divided. In his response to the Medical School's *en banc* petition, Nassar did not even dispute that there was a circuit split. He had good company: appellate judges, district judges, and commentators alike have recognized the circuit split. Pet. 16–18.

Now, however, Nassar argues that there is no split because only two courts of appeals "have considered whether Title VII retaliation claims may proceed under a mixed-motive theory after *Gross*," and those courts agree. Br. in Opp. 11. The circuit split is not sidestepped so easily.

As the petition explains, the question on which the courts of appeals are divided is whether *Gross* or *Price Waterhouse* establishes the general rule for federal employment statutes that do not specifically address mixed-motive claims. Pet. 11–16. This fundamental disagreement is not limited to any one statute. Either *Gross* is a "uniform principle" directing that "the mixed-motive analysis is no longer applicable outside of Title VII discrimination" unless Congress specifically indicates otherwise, or it is not. *Smith*, 602 F.3d at 336–37 (Jolly, J., dissenting). Indeed, Nassar points to *nothing* in the text or history of Title VII's retaliation provision that distinguishes it from the discrimination and retaliation provisions of the Age Discrimination in Employment Act ("ADEA"), the Americans with Disabilities Act ("ADA"), or the Rehabilitation Act.

The circuit split is especially evident in the Seventh Circuit's broad holding that "*Gross* . . . holds that, unless a statute . . . provides otherwise, demonstrating but-for causation is part of the plaintiff's burden in *all* suits under federal law," *Fairley v. Andrews*, 578 F.3d 518, 525–26 (7th Cir. 2009) (Easterbrook, J.) (emphasis added) — specifically including suits under the ADA's discrimination and retaliation provisions, as well as 42 U.S.C. § 1983. Pet. 11–12. Such a holding is irreconcilable with the Fifth Circuit's holdings in this case and *Smith* that *Gross* does not govern Title VII's retaliation provision, even though that provision is materially identical to the ADEA provision this Court construed in *Gross*. Pet. 11–14.

Indeed, the *Smith* majority expressly disagreed with the Seventh Circuit's "broad" holding, and the dissents in *Smith* and this case expressly acknowledged the circuit split. Pet. 13. So did the Eleventh Circuit when it sided with the Fifth Circuit over the Seventh in another Title VII retaliation case. Pet. 14.[2]

Nassar emphasizes that the majorities in two other circuits, which followed the "same path" as the Seventh Circuit, stated that their decisions were reconcilable with *Smith*. *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 319 (6th Cir. 2012); *Palmquist v. Shinseki*, 689 F.3d 66, 74 (1st Cir. 2012). But the petition, as well as dissenting judges in those cases, already showed why the majorities' efforts to distinguish *Smith* are so unconvincing that they only confirm the split. Pet. 14–16. Nassar does not even acknowledge this showing.

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[2] Even before *Gross*, the Seventh Circuit held that the mixed-motive amendments to Title VII apply only to discrimination claims, not retaliation claims like Nassar's, and that a Title VII retaliation plaintiff must therefore "establish that the alleged discrimination was the 'but for' cause of a disputed employment action." *McNutt v. Bd. of Trustees of the Univ. of Ill.*, 141 F.3d 706, 709 (7th Cir. 1998). The Seventh Circuit subsequently held that, under both *Gross* and *McNutt*, a plaintiff can prevail "[o]nly by proving that a forbidden criterion was a but-for cause of the decision," and "[i]n *that* respect, *McNutt* is consistent with . . . *Gross*." *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 963 (7th Cir. 2010) (emphasis added). The Seventh Circuit's continuing endorsement of *McNutt*'s use of a but-for test in the Title VII retaliation context further confirms the division between the Fifth and Seventh Circuits.

Since the Medical School filed its petition, more district courts have taken sides. The Western District of Oklahoma allowed (but found insufficient) a claim that a plaintiff's disability had been "a motivating factor" in a hiring decision, *Hamilton v. Oklahoma City University*, No. CIV-10-1254-D, 2012 WL 5949122, at *6 (Nov. 28, 2012); meanwhile, the District of Maryland applied *Gross* to an ADA claim, *Blind Industries & Services of Maryland v. Route 40 Paintball Park.*, No. WMN-11-3562, 2012 WL 6087489, at *3 (Dec. 5, 2012). Courts will continue to choose sides until this Court settles this frequently recurring question.

III. THE DECISION BELOW CONFLICTS WITH *GROSS*.

Gross expressly rejected *all* of Nassar's merits arguments, which are lifted from the *dissent* in that case. *Compare* Br. in Opp. 15–17, *with Gross*, 557 U.S. at 185–87 (Stevens, J., dissenting). Nassar argues that when Congress amended Title VII's discrimination provision in 1991 in response to *Price Waterhouse*, it made no relevant change to Title VII's retaliation provision. But the same is true of the ADEA.

When Congress amended Title VII's discrimination provision, it "contemporaneously amended the ADEA in several ways" as well. *Gross*, 557 U.S. at 174. This Court determined that Congress's decision to authorize mixed-motive claims in Title VII's discrimination provision, but "not make similar changes to the ADEA," weighed *against* recognizing mixed-motive claims in the ADEA. *Id.*

That conclusion has at least as much force in this case as in *Gross*. Congress's 1991 amendments to Title VII specifically authorized mixed-motive claims in one provision (discrimination), but not another (retaliation), *in the same statute*. Pet. 18–19.

Nassar argues that construing Title VII's discrimination and retaliation provisions to be the same — even though they are textually different — would nonetheless "ensur[e] that the statutory scheme is coherent and consistent." Br. in Opp. 17 (citation omitted). That gets things backwards. *Gross* declined to give the same interpretation to two differently worded statutory provisions (the ADEA and Title VII's discrimination provision) precisely because differences in statutory provisions must be given effect. *Gross*, 557 U.S. at 174–75. Thus, the "coherent and consistent" course is to construe Title VII's retaliation provision to have the same meaning as the similarly worded provision in the ADEA, and a different meaning from the differently worded one in Title VII's discrimination provision — not the other way around.

IV. NASSAR DOES NOT DISPUTE THE EXCEPTIONAL IMPORTANCE OF THE ISSUE PRESENTED.

Even apart from the circuit split and the lower courts' departure from *Gross*, the "profound" importance of the question presented is reason enough to grant the petition. *See Amici* Br. 16. The petition, the *amici* brief filed by the Equal Employment Advisory Council and the Chamber of Commerce, and the scholarly commentary cited in the petition all explain in detail why this frequently

recurring question has, in the dissent's words, such "exceptional importance in employment law." Pet. App. 63; Pet. 19–23; *Amici* Br. 16–19.

Nassar's failure to rebut this extensive showing of practical importance should not obscure it. Mixed motives are easy to allege, hard to disprove, and hard to dispose of on pre-trial motions. Pet. 19–21; *Amici* Br. 17–19. The mixed-motive approach therefore skews the litigation system heavily in plaintiffs' favor, regardless of whether their claims are legitimate. Pet. 20; *Amici* Br. 7, 18. And even if an employer proves as an affirmative defense that it would have taken a challenged employment action regardless of any improper motive, it remains liable and subject to extensive equitable relief and attorneys' fees, as well as reputational consequences stemming from the finding of liability. Pet. 20.

Moreover, this case stands to impact *all* types of employment claims, and perhaps other types of claims as well, because causation is a traditional element of most causes of action. Pet. 21. The frequently recurring nature of the issue means it has percolated thoroughly. Pet. 21–22. And with the number of retaliation claims alone rising sharply, as *amici* explain, the issue will recur even more frequently going forward, until this Court resolves it. *Amici* Br. 17.

V. THIS CASE ILLUSTRATES THE ISSUE'S IMPORTANCE.

Nassar contends that the burden of proof is "almost certainly" irrelevant to the outcome of this case because the burden "only matters where the

evidence is balanced," and the jury in this case "heard conflicting evidence." Br. in Opp. 14. Even on its own terms, Nassar's argument makes little sense. The presence of "conflicting evidence" is more suggestive of balanced evidence than of evidence so one-sided as to make the burden of proof irrelevant.

Moreover, Nassar is wrong about both the evidence and the practical significance of the burden of proof to this case. Under the correct legal standard — which has not yet been applied by any jury or court — the evidence was one-sided in *the Medical School's* favor. The brief in opposition contains a number of factual mischaracterizations that are irrelevant for present purposes and beyond the scope of this brief. (Indeed, much of Nassar's factual discussion relates to the discrimination claim he *lost*, not to his retaliation claim.) The crucial fact is that the undisputed documentary evidence showed the employee charged with retaliation, Dr. Fitz, took the same action Nassar later claimed to be retaliatory *well before* Nassar engaged in any protected activity, and thus *well before* any impetus for retaliation. Medical School's opening brief, No. 11-10338, at 12–13 (5th Cir. June 13, 2011); Pet. 6–8. That evidence shows the School would have — and in fact did — take the same action regardless of any retaliatory motive. Pet. 26.

Nassar responds with evidence that, "*after* Fitz received Nassar's resignation" letter, Fitz expressed a retaliatory animus based on allegations of discrimination that Nassar made in the letter. Br. in Opp. 5. But that only confirms that any retaliatory motive arose, at the earliest, upon Nassar's

resignation in July 2006 — well after Fitz made and announced his decision in March 2006. *See* Pet. 6–7.

Nassar now attempts to back-date his protected activity by alleging that he complained to Fitz in 2005 and early 2006. But those earlier complaints about a supervisor's treatment of Nassar did not allege discrimination on the basis of his race, ethnicity, or religion, and thus did not constitute protected activity as a matter of law. *See, e.g.*, *Fallon v. Potter*, 277 F. App'x 422, 426 (5th Cir. 2008); *Harris-Childs v. Medco Health Solutions, Inc.*, 169 F. App'x 913, 916 (5th Cir. 2006). Presumably for that reason, Nassar did not charge the Medical School with any retaliation based on those complaints; instead, he specifically cited his resignation letter as the protected impetus for retaliation. *See, e.g.* R. 1899 (pretrial order); R. 3533 (Nassar's EEOC complaint).

Not surprisingly, the district court observed that the Medical School "put forth a strong defense" on this issue. Pet. App. 115. At a bare minimum, the evidence was not so one-sided in *Nassar's* favor that switching the burden of proof to the Medical School could be considered harmless.

Nassar is also wrong about the practical significance of the burden of proof. "Where the burden of proof lies on a given issue is, of course, rarely without consequence and *frequently* may be dispositive to the outcome of the litigation or application." *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 626 (1993) (citations omitted; emphasis added); *see also Addington v. Texas*, 441 U.S. 418, 424 (1979).

Mixed-motive cases like this one are no exception. Robert Belton, *Burdens of Pleading and Proof in Discrimination Cases*, 34 VAND. L. REV. 1205, 1207–08 (1981). An empirical study recently showed that "differing burdens of proof produce different results," and that plaintiffs prevail "significantly more often" under a mixed-motive instruction than under a but-for standard. David Sherwyn & Michael Heise, *The* Gross *Beast of Burden of Proof*, 42 ARIZ. ST. L.J. 901, 938, 944 (2010). That is one of the reasons the issue is so important and ripe for this Court's review.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

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No. 12-484

IN THE

Supreme Court of the United States

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER,

Petitioner,

v.

NAIEL NASSAR, M.D,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE

Supreme Court of the United States

No. 12-484

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER,

Petitioner,

v.

NAIEL NASSAR, M.D,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council (EEAC) and Chamber of Commerce of the United States of America (Chamber) respectfully submit this brief *amici curiae* with the consent of the parties. The brief supports the petition for a writ of certiorari.[1]

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of *amici curiae's* intention to file this brief. Both parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes approximately 300 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation, representing approximately 300,000 direct members and an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community.

All of *amici's* members are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, as amended, and other federal employment-related laws and regulations. As em-

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fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

ployers, and as potential defendants to claims asserted under these laws, *amici* have a substantial interest in the issue presented in this case regarding the availability of the mixed-motive standard of proof in Title VII retaliation and non-Title VII discrimination cases, in light of this Court's decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009).

Because of their interest in the application of the nation's fair employment laws, EEAC and/or the Chamber have filed numerous briefs as *amicus curiae* in cases before this Court and the courts of appeals involving the proper construction and interpretation of Title VII and other federal laws.[2] Thus, *amici* have an interest in, and a familiarity with, the issues and policy concerns involved in this case.

Amici seek to assist the Court by highlighting the impact its decision may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant matter that has not already been brought to its attention by the parties. Because of their experience in these matters, *amici* are well-situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Respondent Naiel Nassar began his employment with Petitioner, the University of Texas Southwestern Medical Center (UTSW), in 1995. Pet. App. 2. After taking three years off, he returned to UTSW in 2001 as Assistant Professor of Internal Medicine and

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[2] *See, e.g., Gross v. FBL Fin. Svcs., Inc.*, 557 U.S. 167 (2009); *Burlington Northern & Santa Fe Rwy. v. White*, 548 U.S. 53 (2006); *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

Associate Medical Director of the Clinic. *Id.* His immediate supervisor was Dr. Phillip Keiser, who in turn reported to Dr. Beth Levine, Chief of Infectious Disease Medicine. *Id.*

Nassar complained that he allegedly was being harassed by Levine, and sought transfer to another role that would take him out of her line of supervision. Pet. App. 4. He stepped down from his faculty post when he received a job offer working for an affiliated clinic (Parkland), effective July 10, 2006. Pet. App. 5. On July 3, he submitted a letter of resignation in which he asserted that his "primary reason" for resigning was because of Levine's harassing and discriminatory behavior. *Id.* Shortly thereafter, Parkland withdrew its job offer. *Id.*

Nassar brought suit in federal court, accusing UTSW of orchestrating Parkland's refusal to hire him in retaliation for his discrimination complaints, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a). Pet. App. 6. At trial, Nassar presented evidence suggesting that Dr. Gregory Fitz, UTSW's Chair of Internal Medicine and Levine's immediate supervisor, was upset by the accusations contained in Nassar's resignation letter, and set out to persuade Parkland not to hire him. Pet. App. 5. For its part, UTSW presented evidence that Parkland was contractually bound to hire only UTSW faculty to work in its clinic, and that Fitz was opposed to Nassar's placement there as early as April 2006—well prior to his resignation. Pet. App. 4-5.

The jury found that UTSW constructively discharged and retaliated against Nassar, and awarded him $3.4 million in back pay and compensatory damages. Pet. App. 6-7. After the trial court denied its post-trial motion for judgment as a matter of law,

UTSW appealed to a three-judge panel of the Fifth Circuit, arguing among other things that Nassar failed to prove that retaliation was the but-for cause of Parkland's decision not to hire him. Pet. App. 7.

Citing to its 2010 ruling in *Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010) – which held that the mixed-motive framework is available to Title VII retaliation plaintiffs, even after this Court's 2009 ruling in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009) – the panel, without further analysis, affirmed the district court's judgment regarding liability for retaliation. Pet. App. 12. After its requests for rehearing and rehearing *en banc* were denied, UTSW filed a Petition for a Writ of Certiorari with this Court.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The decision below, which held that plaintiffs suing for workplace retaliation under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, need prove only that retaliation was one of any number of factors in the challenged employment decision, deepens an already-persistent conflict in the courts regarding the extent to which the mixed-motive framework is available in non-Title VII discrimination cases in light of this Court's decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009).

In *Gross*, this Court held that plaintiffs alleging intentional age discrimination in violation of the Age Discrimination in Employment Act (ADEA) cannot proceed under a mixed-motive theory because doing so would impermissibly relieve them of the ultimate burden of proving that the challenged employment

action was taken "because of" age. Noting that Congress amended Title VII's nondiscrimination provisions in 1991 expressly to incorporate a "motivating factor" test but "neglected to add such a provision to the ADEA... even though it contemporaneously amended the ADEA in several ways," the Court concluded that it would be improper to import the burden-shifting scheme to the ADEA. *Gross*, 557 U.S. at 168. The Court observed:

> We cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally. Furthermore, as the Court has explained, 'negative implications raised by disparate provisions are strongest' when the provisions were 'considered simultaneously when the language raising the implication was inserted.'

Id. at 174-75.

Significantly, Title VII's motivating factor test applies only to cases of discrimination on the basis of race, color, religion, sex or national origin, and does not extend to causes of action for unlawful retaliation. It follows then, applying *Gross*, that plaintiffs suing for unlawful retaliation cannot proceed under a mixed-motives theory, but rather must prove that retaliation was the "but-for" reason for the adverse employment action. The First, Sixth and Seventh Circuits adhere to the view that unless the statute states otherwise, a discrimination (or retaliation) plaintiff must establish "but-for" causation, while the Fifth and Eleventh Circuits limit the applicability of *Gross* strictly to ADEA cases.

Permitting Title VII retaliation plaintiffs to pursue claims under a mixed-motive theory – a significantly less onerous standard that shifts the burden of proof to the employer upon a showing that both lawful and prohibited considerations played a role in the adverse action – would undermine the plain text of Title VII and contravene *Gross*. Moreover, permitting plaintiffs to manipulate the burdens of proof in this manner increases significantly their chances of avoiding summary judgment, and ultimately prevailing at trial, even where their evidence is very weak.

If left unresolved, this conflict will continue to lead to uneven application of employment law, with significant practical implications for the federal judiciary, as well as both plaintiffs and defendants alike. Accordingly, review of the decision below by this Court is warranted.

REASONS FOR GRANTING THE WRIT

REVIEW OF THE DECISION BELOW IS NECESSARY IN ORDER TO PROVIDE MUCH NEEDED CLARITY ON ISSUES OF SUBSTANTIAL IMPORTANCE TO THE EMPLOYER COMMUNITY

A. The Decision Below Is Directly Contrary To Title VII And This Court's Decision In *Gross*

1. The plain text of Title VII makes the mixed-motive analysis available only in cases of discrimination because of race, color, religion, sex or national origin

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, contains two distinct provisions mak-

ing certain employment practices unlawful. "The antidiscrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status," *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53, 63 (2006) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-01 (1973)), whereas the anti-retaliation provision "seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." *Id.*

As this Court has observed, "[t]he substantive provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The antiretaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct." *Id.* Specifically, Section 703(a)(1) provides that:

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1). Separately, Section 704(a) makes it unlawful:

> for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this [subchapter], or because he has made a charge, testified, assisted, or participated in any manner in an

> investigation, proceeding, or hearing under this [subchapter].

42 U.S.C. § 2000e-3(a).

In *Price Waterhouse v. Hopkins*, this Court ruled that where a plaintiff proves that gender, along with other legitimate factors, played "a motivating part" in an employment decision, the plaintiff has shown that the decision was "because of" sex in violation of Title VII's anti-discrimination provision. 490 U.S. 228, 250 (1989). Under those circumstances, the employer can avoid liability only if it proves, by a preponderance of the evidence, that it would have made the same decision without considering the protected characteristic. *Id.* at 249.

This method of proof has come to be referred to as the "mixed-motive" analysis, *id.* at 246, which recognizes the relatively rare circumstance in which there exists compelling, "smoking gun" evidence of discrimination, yet the employer contends that it would have taken the same employment action in any event. *Id.* at 247. Under that test, if the plaintiff persuades the trier of fact that the employer actually considered an illegitimate factor, the burden of persuasion shifts to the employer to prove that it would have reached the same decision based solely on legitimate factors. *Id.* at 246.

Two years after this Court decided *Price Waterhouse*, Congress enacted the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), which established a "motivating factor" test applicable to mixed-motive cases brought under Title VII's nondiscrimination provision. Specifically, Section 107 of the 1991 Act provides that after a plaintiff "demonstrates that race, color, religion, sex, or national origin was a

motivating factor" – along with other, legitimate considerations – for "any employment practice," 42 U.S.C. § 2000e-2(m), the employer may limit its liability significantly for damages stemming from the discrimination by demonstrating that it "would have taken the same action in the absence of the impermissible motivating factor ... ." 42 U.S.C. § 2000e-5(g)(2)(B). Section 107 explicitly makes the mixed-motive analysis available only to cases of *discrimination* on the basis of race, color, religion, sex or national origin, not to causes of action for unlawful *retaliation* under Section 704.

2. *Gross* casts considerable doubt on, if not forecloses entirely, the availability of the mixed-motive theory where the underlying statute does not expressly authorize it

In *Gross v. FBL Financial Services, Inc.*, this Court held that plaintiffs alleging intentional age discrimination in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, cannot proceed under a mixed-motive theory because doing so impermissibly would relieve them of the ultimate burden of proving that the challenged employment action was taken "because of" age. 557 U.S. 167, 175-76 (2009). The Court found particularly persuasive the fact that Congress declined to amend the ADEA, as it did portions of Title VII, to include a motivating factor test:

> Unlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Moreover, Congress neglected to add such a provision to the ADEA when it amended Title VII to add §§ 2000e-2(m) and 2000e-5(g)(2)(B),

> even though it contemporaneously amended the ADEA in several ways. We cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally.

Gross, 557 U.S. at 174 (citations omitted). That same rationale also should be applied to foreclose mixed-motive claims where, as here, the underlying statute does not expressly authorize it. As the Seventh Circuit pointed out, "[a]lthough the *Gross* decision construed the ADEA, the importance that the [C]ourt attached to the express incorporation of the mixed-motive framework into Title VII suggests that when another anti-discrimination statute lacks comparable language, a mixed-motive claim will not be viable under that statute." *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 961 (7th Cir. 2010).

As noted above, Title VII's motivating factor test applies only to causes of action alleging *discrimination* on the basis of race, color, religion, sex or national origin, and does not extend to those for unlawful retaliation. Lower courts properly applying *Gross* therefore would be expected to agree that plaintiffs suing for Title VII *retaliation* cannot proceed under a mixed-motives theory, but rather must prove that retaliation was the "but-for" reason for the adverse employment action. Indeed, *Gross* seemingly precludes the application of a mixed-motive standard to *any* case involving a statute that does not expressly relieve the plaintiff of the burden of persuasion. *See, e.g., Formella v. U.S. Dep't of Labor*, 628 F.3d 381, 389 (7th Cir. 2010) ("because of" language of Surface Transportation Assistance Act of

1982, 49 U.S.C. § 31105(a), would require but-for showing in light of *Gross*, except for 2007 amendments expressly incorporating a "contributing factor" test).

B. Lower Courts Are In Profound Disagreement Regarding The Effect Of *Gross* On Non-ADEA Cases

Yet of the five federal courts of appeals to have addressed the availability of the mixed-motive framework under various employment laws since *Gross* was decided, two have deemed *Gross* essentially irrelevant outside of the ADEA context, while three others properly have applied the Court's reasoning to cases brought under analogous statutes. *Compare Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010); *Saridakis v. S. Broward Hosp. Dist.*, 468 Fed. Appx. 926 (11th Cir.), *cert. denied*, 184 L. Ed. 2d 255 (2012), *with Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir. 2010); *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312 (6th Cir. 2012) (*en banc*); *Palmquist v. Shinseki*, 689 F.3d 66 (1st Cir. 2012). Without a course correction by this Court, the troubling conflict among the lower courts regarding the propriety of relieving a discrimination or retaliation plaintiff of the burden of persuasion will become even more pronounced.

1. The First, Sixth, and Seventh Circuits logically extend the rationale of *Gross* beyond the ADEA context

The First, Sixth, and Seventh Circuits correctly adhere to the view that, under *Gross*, a discrimination (or retaliation) plaintiff must establish "but-for" causation, unless the underlying statute expressly provides otherwise. In *Serwatka v. Rockwell Auto-*

mation, Inc., 591 F.3d 957 (7th Cir. 2010), the Seventh Circuit ruled that a plaintiff suing for employment discrimination under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*, was not entitled to a mixed-motive jury instruction, because unlike Title VII, the ADA simply does not authorize recovery under a mixed-motive theory.

Although *Gross* examined the question of mixed-motive jury instructions in cases brought under the ADEA, the Seventh Circuit found its reasoning equally applicable to cases brought under the ADA, since Congress did not amend either statute expressly to incorporate a "motivating factor" test. In doing so, the appeals court reversed its own long-standing precedent that permitted mixed-motive jury instructions in ADA cases, concluding, in light of *Gross*, "that in the absence of any additional text bringing mixed-motive claims within the reach of the statute, the statute's 'because of' language demands proof that a forbidden consideration – here, the employee's perceived disability – was a 'but-for' cause of the adverse action complained of." *Serwatka*, 591 F.3d at 962. Similarly, in *Palmquist v. Shinseki*, 689 F.3d 66 (1st Cir. 2012), the First Circuit held that the mixed-motive theory is not available to plaintiffs suing for disability discrimination under the Rehabilitation Act of 1973, 29 U.S.C. §§ 791 *et seq.*, which also like the ADEA, does not contain a motivating factor provision.

The Sixth Circuit also held recently in *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312 (6th Cir. 2012) (*en banc*), that in the absence of express statutory language incorporating a motivating factor test, plaintiffs suing for discrimination under the ADA must prove that disability was the "but-for"

reason for the contested employment action. Before reaching that question, however, the court dismissed the notion that the Rehabilitation Act's more restrictive "sole factor" test applies to the ADA, concluding that while the two laws share common goals and purposes, key textual differences prevent them from being applied in an identical manner. 681 F.3d at 317. For example, while the ADA prohibits discrimination "because of" disability, the Rehabilitation Act bars discrimination "solely by reason of" disability, and despite having amended both laws many times over the years, Congress never saw fit to import the "solely by reason of" language into the ADA. *Id.* at 316-17.

For similar reasons and especially in view of *Gross*, the Sixth Circuit went on to find it inappropriate to apply Title VII's "motivating factor" test to the ADA, which does not itself contain, and has never been amended to add, such a burden-shifting scheme. *Id.* at 317. It rejected the plaintiff's contention that because the ADA specifically incorporates Title VII's enforcement and remedial provisions, it should be interpreted to allow for mixed-motives claims, observing in particular that while some of Title VII's remedies and procedures are made part of the ADA, the motivating factor provision, § 2000e-2(m), is not one of them. *Id.* at 319-20. The Sixth Circuit concluded that since both the ADEA and the ADA bar "because of" discrimination, and *Gross* established that "because of" age in the ADEA context means "but-for" age, it follows that "because of" disability can only mean the plaintiff's disability must be the "but-for" reason for the adverse employment action. *Id.* at 321.

2. Adhering to pre-*Gross* precedent, the Fifth and Eleventh Circuits continue to apply the mixed-motive framework mechanically to non-ADEA claims

In contrast, the Fifth and Eleventh Circuits have limited the applicability of *Gross* strictly to ADEA cases. *Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010); *Saridakis v. S. Broward Hosp. Dist.*, 468 Fed. Appx. 926 (11th Cir.), *cert. denied*, 184 L. Ed. 2d (2012). In *Smith v. Xerox Corp.*, for instance, a divided Fifth Circuit panel ruled that the mixed-motive framework continues to be available to Title VII retaliation plaintiffs, despite this Court's strong suggestion to the contrary in *Gross*. It acknowledged, as the Court in *Gross* found, that unlike Title VII, the text of the ADEA does not authorize a motivating factor test, and conceded that Congress similarly declined to make it available to Title VII *retaliation* plaintiffs. While "recogniz[ing] that the *Gross* reasoning could be applied in a similar manner to the instant case," 602 F.3d at 328, the *Smith* panel majority nevertheless concluded that "such a simplified application of *Gross* is incorrect." *Id.* (footnote omitted). "To state the obvious, *Gross* is an ADEA case, not a Title VII case." *Id.* at 329; *accord Saridakis*, 468 Fed. Appx. at 931 ("*Gross* is not controlling because it is an ADEA case ...").

Dismissing *Gross* as thus simply inapplicable, the majority fell back on *Price Waterhouse* and its own pre-*Gross* precedent to allow the plaintiff to recover under a mixed-motive theory. "It is not our place, as an inferior court, to renounce *Price Waterhouse* as no longer relevant to mixed-motive retaliation cases, as that prerogative remains always with the Supreme Court." *Smith*, 602 F.3d at 330. Bound by *Smith*, the

court below thus upheld the jury verdict in favor of the plaintiff on his mixed-motive Title VII retaliation claim.

District courts also are in disagreement as to the applicability of *Gross* beyond the ADEA context. In the absence of binding circuit court precedent, for instance, *see Beckford v. Geithner*, 661 F. Supp. 2d 17, 25 n.3 (D.D.C. 2009), District of Columbia district courts struggle specifically with "whether to extend the *Gross* analysis to Title VII's retaliation provision," *Beckham v. AMTRAK*, 736 F. Supp. 2d 130, 145 (D.D.C. 2010), one court boldly suggesting that the answer to the question "is both yes and no, depending on a plaintiff's allegations and the evidence." *Id.; but compare Hayes v. Sebelius*, 762 F. Supp. 2d 90, 111 (D.D.C. 2011) (*Gross* "resolves any doubt: Title VII plaintiffs may bring neither mixed-motives retaliation claims under *Price Waterhouse* nor motivating-factor retaliation claims under the 1991 Act").

C. The Inconsistency In The Courts Regarding The Applicability Of The Mixed-Motive Proof Scheme To Non-Title VII Discrimination Claims Significantly Disadvantages Employers With Multijurisdictional Operations

Continued inconsistency in this area of the law will have a profound effect on the business community in general, but in particular on large companies that operate and employ staff across the United States and thus necessarily experience higher volumes of employment litigation activity than smaller employers. Companies doing business within the Fifth and Eleventh Circuits must now brace for even more Title VII retaliation charge and litigation activity, even

where legitimate, non-retaliatory justifications unquestionably exist for the challenged employment action.

"The number of retaliation claims filed with the EEOC has proliferated in recent years." *Crawford v. Metro. Gov't. of Nashville*, 555 U.S. 271, 283 (2009) (Alito, J., concurring). In Fiscal Year (FY) 2009, for instance, 36% of all charges filed with the EEOC contained allegations of workplace retaliation, surpassing for the first time the number of race discrimination charges received by the agency; to that point, race had always been the most commonly cited basis for unlawful workplace discrimination. That trend has continued unabated.[3] In FY 2010, the EEOC received a total of 36,258 retaliation charges, a percentage increase of 7.9% over the previous year,[4] and in FY 2011, 37.4% of all charges filed contained retaliation allegations.[5] Although the EEOC consistently finds cause in less than 10% of the retaliation charges filed with it each year, *id.* at n.3, respondents to such charges invariably are forced to devote significant time and resources responding to each charge and cooperating with the EEOC's administrative investigation.

The availability of the mixed-motive framework likely will preclude summary judgment in most cases,

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[3] U.S. Equal Employment Opportunity Comm'n, Charge Statistics FY 1997-FY 2011, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Nov. 16, 2012).

[4] U.S. Equal Employment Opportunity Comm'n, Retaliation-Based Charges FY 1997-FY 2012, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/retaliation.cfm (last visited Nov. 16, 2012).

[5] U.S. Equal Employment Opportunity Comm'n, *supra* note 3.

ultimately making it far easier to establish liability for unlawful retaliation. And opportunistic plaintiff's counsel eager to win their cases – or negotiate generous settlement packages with "deep-pocketed" corporate defendants – will plead every conceivable retaliation claim under both a single-motive and a mixed-motive theory, so as to benefit from not having to bear the ultimate burden of proof in cases in which their pretext evidence is weak or nonexistent. Permitting retaliation plaintiffs to pursue claims under a mixed-motive theory, a significantly less onerous standard that shifts the burden of proof to the employer upon a showing by the employee that both lawful and allegedly retaliatory considerations played a role in the adverse action, thus would encourage the filing of potentially frivolous, preemptive lawsuits, increasing substantially an already heavy litigation burden placed on defendants and the courts.

Furthermore, frivolous mixed-motives claims divert attention and resources away from the development of proactive corporate nondiscrimination and anti-retaliation measures. "Excessive discrimination claims bind employers by forcing them to divert their resources, thereby reducing their efficiency." Joseph J. Ward, *A Call for Price Waterhouse II: The Legacy of Justice O'Connor's Direct Evidence Requirement for Mixed-motive Employment Discrimination Claims*, 61 Alb. L. Rev. 627, 659 (1997). The prospect of turning every Title VII retaliation claim into a mixed-motives case is especially problematic because employment decisions often provide fertile grounds for both discrimination and retaliation claims. Employment decisions frequently rely on subjective criteria, which may encourage a plaintiff to claim that a protected characteristic and/or unlawful retaliation was *a*

motivating factor, as opposed to *the* motivation. As one commentator observed:

> Employment decisions . . . are almost always mixed-motive decisions turning on many factors. While responsible employers will take steps to assure or encourage lawful motivation by participating individuals, it will often be possible for an aggrieved employee or applicant to find someone whose input into the process was in some way motivated by an impermissible factor—a much lighter burden than demonstrating that the forbidden ground of decision was a determining factor. . . . Summary judgment will be less frequent because the plaintiff's threshold burden is so light.

David A. Cathcart & Mark Snyderman, *The Civil Rights Act of 1991*, SF41 ALI-ABA Course of Study 391, 432 (Mar. 1, 2001) (emphasis omitted). Without definitive guidance from this Court regarding the availability of the mixed-motive framework in non-ADEA and non-Title VII discrimination cases, the risk of litigation abuse – and general confusion – remains substantial.

CONCLUSION

Accordingly, the *amici curiae* respectfully request the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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November 2012

JOINT APPENDIX

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
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No. 12-484

In the
Supreme Court of the United States

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER,

PETITIONER,

v.

NAIEL NASSAR, M.D.,

RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT APPENDIX

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42 U.S.C. § 2000e-3(a) App-96

42 U.S.C. § 2000e-5(g) App-97

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

NAIEL NASSAR, M.D.,

v.

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, *et al.*

RELEVANT DOCKET ENTRIES

No. 3:08-CV-1337-B

Date Filed	#	Document
08/04/2008	1	Complaint with Jury Demand filed by Naiel Nassar.
	* * *	
8/19/2008	11	Plaintiff's First Amended Complaint filed by Naiel Nassar.
8/29/2008	15	Original Answer to Amended Complaint filed by University of Texas Southwestern Medical Center.
	* * *	
07/06/2009	42	Motion to Dismiss and Motion for Summary Judgment filed by University of Texas Southwestern Medical Center, *et al.*

07/06/2009	43	Memorandum in Support of Motion to Dismiss and Motion for Summary Judgment filed by University of Texas Southwestern Medical Center, *et al.*
07/06/2009	44	Appendix in Support of Motion to Dismiss and Motion for Summary Judgment filed by University of Texas Southwestern Medical Center, *et al.*
		* * *
07/24/2009	52	Response to Motion to Dismiss and Motion for Summary Judgment with Brief in Support filed by Naiel Nassar.
07/24/2009	53	Appendix in Support of Response to Motion to Dismiss and Motion for Summary Judgment filed by Naiel Nassar.
		* * *
08/10/2009	56	Reply Brief in Support of Motion to Dismiss and Motion for Summary Judgment filed by University of Texas Southwestern Medical Center, *et al.*

08/11/2009	57	Appendix in Support of Reply Brief in Support of Motion to Dismiss and Motion for Summary Judgment filed by University of Texas Southwestern Medical Center, *et al.*
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09/28/2009	78	Plaintiff's Pretrial Disclosures filed by Naiel Nassar.
09/28/2009	79	Pretrial Disclosures Under Rule 26(a)(3)(A)(i)-(iii) filed by University of Texas Southwestern Medical Center, *et al.*
	* * *	
10/05/2009	81	Supplemental Pretrial Disclosures Under Rule 26(a)(3)(A)(i)-(iii) filed by University of Texas Southwestern Medical Center, *et al.*
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10/12/2009	87	Plaintiff's Objections to Pretrial Disclosures Under Rule 26(a)(3)(A)(i)-(iii) filed by Naiel Nassar.
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10/12/2009	89	Defendants' Objections to Pretrial Disclosures filed by University of Texas Southwestern Medical Center, *et al.*
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04/12/2010	105	Defendants' Amended Pretrial Disclosures filed by University of Texas Southwestern Medical Center, *et al.*
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04/29/2010	109	Exhibit List filed by Naiel Nassar.
04/29/2010	110	Witness List filed by Naiel Nassar.
04/29/2010	111	Proposed Jury Charge filed by Naiel Nassar.
	* * *	
04/29/2010	113	Motion in Limine with Memorandum in Support filed by Naiel Nassar
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05/03/2010	115	Motion in Limine filed by University of Texas Southwestern Medical Center.
05/03/2010	116	Proposed Jury Instructions filed by University of Texas Southwestern Medical Center.
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05/03/2010	118	Trial Brief filed by University of Texas Southwestern Medical Center.
05/04/2010	119	Trial Brief Correction filed by University of Texas Southwestern Medical Center.
05/10/2010	120	Proposed Pretrial Order Corrected filed by University of Texas Southwestern Medical Center.

05/10/2010	121	Exhibit List Amended by Naiel Nassar.
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05/12/2010	125	Proposed Jury Charge filed by Naiel Nassar.
05/12/2010	126	Stipulation Agreed Upon Juror Questionnaire by Naiel Nassar.
05/12/2010	127	Defendant's Objections and Motion to Strike Plaintiff's Amended Exhibit List filed by University of Texas Southwestern Medical Center.
05/12/2010	128	Response to Motion to Strike & Objection to Plaintiff's Amended Exhibit List filed by Naiel Nassar.
05/12/2010	129	Agreements on Admissibility Pursuant to November 3, 2008 Scheduling Order's Conference Requirements filed by Naiel Nassar.
05/12/2010	130	Reply in Support of Defendant's Objections and Motion to Strike Plaintiff's Amended Exhibit List filed by University of Texas Southwestern Medical Center.
	* * *	

05/12/2010	133	Exhibit List by University of Texas Southwestern Medical Center.
05/12/2010	134	Witness List by University of Texas Southwestern Medical Center.
05/13/2010	135	Affidavit Sponsoring Declaration of Peter A. Robinson, Records Disclosure Coordinator for the EEOC, Proving up the EEOC file re: Charge No. 450-2006-02750c as a Business Record and a Certified Public Record re: Plaintiff's Designated Trial Exhibits 77 and 78 (declaration bates stamped Nassar 678 in discovery) by Naiel Nassar.
05/13/2010	136	Response to Plaintiff's Objections to Pretrial Disclosures and Exhibit List filed by University of Texas Southwestern Medical Center.
05/15/2010	137	Defendant's Supplemental Briefing on the EEOC's Letter of Determination filed by University of Texas Southwestern Medical Center.
05/16/2010	138	Amended Designation of Deposition by Naiel Nassar.

05/17/2010	–	Minute Entry for Proceedings Held Before Judge Jane J. Boyle: Jury Trial begun on 5/17/2010.
05/18/2010	–	Minute Entry for Proceedings Held Before Judge Jane J. Boyle: Jury Trial held on 5/18/2010.
05/19/2010	–	Minute Entry for Proceedings Held Before Judge Jane J. Boyle: Jury Trial held on 5/19/2010.
05/20/2010	–	Minute Entry for Proceedings Held Before Judge Jane J. Boyle: Jury Trial held on 5/20/2010.
05/21/2010	–	Minute Entry for Proceedings Held Before Judge Jane J. Boyle: Jury Trial held on 5/21/2010.
05/24/2010	140	Jury Instructions.
05/24/2010	–	Jury Verdict, Signed by Judge Jane J. Boyle.
05/24/2010	141	Jury Note #1.
05/24/2010	142	Response Jury Note #1 Signed by Judge Jane J. Boyle.

05/25/2010	–	Minute Entry for Proceedings Held Before Judge Jane J. Boyle: Jury Trial held on 5/24/2010.
05/25/2010	–	Minute Entry for Proceedings Held Before Judge Jane J. Boyle: Jury Trial held on 5/25/2010.
05/26/2010	143	Jury Instructions, Signed by Judge Jane J. Boyle.
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05/28/2010	145	Joint Pretrial Order, Judge Jane J. Boyle.
6/11/2010	146	Motion for Attorney Fees Pursuant to 42 USC 2000e-(5) and Application for Upward Lodestar Departure filed by Naiel Nassar.
6/11/2010	147	Motion Application for Court Award of Front Pay with Memorandum in Support filed by Naiel Nassar.

06/14/2010	148	Motion to Enter Final Judgment against UT Southwestern Medical Center with Memorandum in Support filed by Naiel Nassar.
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07/02/2010	158	Response to Motion for Attorney Fees Pursuant to 42 USC 2000e-(5) and Application for Upward Lodestar Departure filed by University of Texas Southwestern Medical Center
07/07/2010	159	Reply in Support of Motion for Attorney Fees Pursuant to 42 USC 2000e-(5) and Application for Upward Lodestar Departure filed by Naiel Nassar.
07/27/2010	160	Memorandum Opinion and Order Granting in Part and Denying in Part Motion for Attorney Fees, Judge Jane J. Boyle.
	* * *	
08/13/2010	170	Response to Motion to Enter Final Judgment against UT Southwestern Medical Center filed by University of Texas Southwestern Medical Center.

08/13/2010	171	Response to Motion Application for Court Award of Front Pay filed by University of Texas Southwestern Medical Center.
08/25/2010	172	Reply in Support of Motion to Enter Final Judgment against UT Southwestern Medical Center filed by Naiel Nassar.
08/27/2010	173	Reply in Support Motion Application for Court Award of Front Pay filed by Naiel Nassar.
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09/16/2010	175	Order Denying Motion for An Award of Front Pay, Judge Jane J. Boyle.
09/16/2010	176	Order Granting Motion for Final Judgment, Judge Jane J. Boyle.
		* * *
09/21/2010	178	Motion to Alter Judgment or Relief from Judgment with Memorandum in Support filed by Naiel Nassar.
		* * *
10/01/2010	181	Unopposed Motion to Stay Execution of Judgment Without Posting Supersedeas Bond filed by University of Texas Southwestern Medical Center.

10/04/2010	182	Order Granting Unopposed Motion to Stay Execution of Judgment Without Posting Supersedeas Bond, Judge Jane J. Boyle.
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10/12/2010	186	Response to Motion to Alter Judgment or Relief from Judgment filed by University of Texas Southwestern Medical Center.
10/14/2010	187	Motion for Judgment as a Matter of Law, or in the Alternative, Motion for New Trial or Remittitur filed by University of Texas Southwestern Medical Center.
10/14/2010	188	Memorandum in Support of Motion for Judgment as a Matter of Law, or in the Alternative, Motion for New Trial or Remittitur filed by University of Texas Southwestern Medical Center.
	* * *	
10/28/2010	192	Costs Taxed in amount of $3,105.86 against Naiel Nassar, MD.

11/01/2010	193	Response to Motion for Judgment as a Matter of Law, or in the Alternative, Motion for New Trial or Remittitur filed by Naiel Nassar.
11/03/2010	194	Memorandum Opinion and Order Granting in Part and Denying in Part Motion to Alter Judgment, Judge Jane J. Boyle.
11/15/2010	195	Reply in Support of Motion for Judgment as a Matter of Law, or in the Alternative, Motion for New Trial or Remittitur filed by University of Texas Southwestern Medical Center.
* * *		
03/21/2011	197	Plaintiff's Letter to Court re: Additional Briefing re: Motion for Judgment as a Matter of Law, or in the Alternative, Motion for New Trial or Remittitur filed by Naiel Nassar.
03/23/2011	198	Order Denying Motion for Judgment; Denying Motion for New Trial, Judge Jane J. Boyle.

04/01/2011	199	Notice of Appeal to the Fifth Circuit filed by University of Texas Southwestern Medical Center.
	* * *	
04/22/2011	202	Notice of Cross Appeal to the Fifth Circuit filed by Naiel Nassar.
	* * *	
07/30/2012	206	Motion for Reconsideration of Order on Motion for Miscellaneous Relief, Naiel Nassar, M.D.'s Motion to Award Front Pay on Remand from the Fifth Circuit following the issuance of the Mandate and Brief in Support thereof filed by Naiel Nassar.
	* * *	
08/02/2012	209	Opinion of the United States Court of Appeals.
08/02/2012	210	Judgment/Mandate of the United States Court of Appeals. It is Ordered and Adjudged that the Judgment of the District Court is Affirmed in Part and Vacated in Part, and the Cause is Remanded to the District Court for Further Proceedings in Accordance with the Opinion of this Court. Issued as Mandate: 7/27/12.

	* * *	
09/07/2012	214	Order Staying Case. The Parties are Hereby Ordered to Inform the Court Promptly Should Certiorari be Granted or Denied, Judge Jane J. Boyle.
01/22/2013	215	Motion to Stay re: Order Staying Case and Notice Regarding Disposition of Petition for Certiorari filed by University of Texas Southwestern Medical Center.
01/22/2013	216	Order: In light of the United States Supreme Court's decision to Grant UT Southwestern's Petition for Certiorari, the Court Stays this Case Pending a Final Resolution of the Proceedings before the United States Supreme Court. The parties are Ordered to Inform the Court Promptly Following a Final Resolution of the Matter in the United States Supreme Court, Judge Jane J. Boyle/

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NAIEL NASSAR, M.D.,

v.

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER.

RELEVANT DOCKET ENTRIES

No. 11-10338

Date Filed	Document
04/05/2011	Civil Rights Case Docketed. Notice of Appeal filed by Appellant University of Texas Southwestern Medical Center.
	* * *
05/09/2011	Unopposed Motion filed by Appellant Cross-Appellee University of Texas Southwestern Medical Center and Appellee Naiel Nassar, M.D. to Supplement the Record with Trial Transcript Containing videotape deposition of MD Ross.
05/09/2011	Clerk Order Granting Motion to Supplement the Record on Appeal.
	* * *

05/13/2011	Exhibits, Stipulated Supplemental Record - Deposition of MD Ross Filed.
05/27/2011	Exhibits, Trial Exhibits Filed.
* * *	
06/13/2011	Appellant's Brief filed by University of Texas Southwestern Medical Center.
06/13/2011	Record Excerpts filed by Appellant Cross-Appellee University of Texas Southwestern Medical Center.
* * *	
07/14/2011	Cross Appellant's Brief Filed by Appellee Cross-Appellant Mr. Naiel Nassar.
07/15/2011	Record Excerpts filed by Appellee Cross-Appellant Mr. Naiel Nassar.
* * *	
08/30/2011	Cross-Appellee's Brief filed by Appellant Cross-Appellee University of Texas Southwestern Medical Center.
* * *	
09/06/2011	Cross Appellant's Reply Brief filed by Appellee Cross-Appellant Mr. Naiel Nassar.
* * *	

02/22/2012	Change Calendar Information. The Panel to Whom the Above Referenced cases is Assigned has Determined under FRAP 34(a) that Oral Argument Will Not Be Required in this Case. Therefore, Counsel Need Not Appeal for Argument on 3/08/2012.
03/08/2012	No Oral Argument Heard.
03/08/2012	Published Opinion Filed, Reavley, Elrod, and Haynes, Circuit Judges.
03/08/2012	Judgment Entered and Filed.
03/08/2012	Costs Taxes Against: Each Party to Bear its Own Costs on Appeal.
03/22/2012	Petition for Panel Rehearing filed by Appellant Cross-Appellee University of Texas Southwestern Medical Center.
03/22/2012	Petition for Rehearing En Banc filed by Appellant Cross-Appellee University of Texas Southwestern Medical Center.
	* * *
04/05/2012	Court Order Denying Petition for Rehearing En Banc.
04/06/2012	Court Order: The Order Entered April 5, 2012 Denying Petition for Rehearing En Banc is Rescinded as Having Prematurely Issued.

04/06/2012	Court Directive Issued Requesting Response to the Petition for Rehearing En Banc.
	* * *
04/23/2012	Response/Opposition to the Petition for Rehearing En Banc filed by Appellee Cross-Appellant Mr. Naiel Nassar.
	* * *
05/07/2012	Reply to Response/Opposition to the Petition for Rehearing En Banc filed by Appellant Cross-Appellee University of Texas Southwestern Medical Center.
07/19/2012	Court Order Denying Petition for Rehearing En Banc.
07/27/2012	Mandate Issued.
	* * *

MEMORANDUM OPINION AND ORDER GRANTING
DKT. NO. 100, FEB. 19, 2010

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NAIEL NASSAR, MD, *Plaintiff,* v. UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, PARKLAND HEALTH & HOSPITAL SYSTEM, BETHE LEVINE, M.D., and J. GREGORY FITZ, M.D. *Defendants.*	§ § § § § § § § § § § § § §	Civil Action No. 3:08-CV-1337-B

MEMORANDUM OPINION ORDER

Before the Court is the motion of Defendant Parkland Health & Hospital System ("Parkland") for summary judgment on all of Plaintiff's claims. (doc. 49).[1] For the reasons set forth below, the Court **GRANTS** Defendants' motion.

[1]Plaintiff also asserts claims against Defendants UT Southwestern, Dr. Levine, and Dr. Fitz that are the subject of a separate motion to dismiss and for summary judgment (doc. 42).

I.

FACTUAL AND PROCEDURAL BACKGROUND

Dr. Nassar is "Muslim and hales from the Middle East." (doc. 54, p. 2). After graduating from medical school in Egypt, Dr. Nassar completed his internship, residency, and fellowship in hospitals in the United States. (doc. 11, p. 4). He is board certified in internal medicine and infectious diseases. (*Id.*).

In January 2001, UT Southwestern hired Dr. Nassar as an Assistant Professor of internal medicine and infectious diseases. (Id.). His duties were to provide patient care at the Amelia Court clinic, which is an outpatient HIV/AIDS clinic that is part of Parkland Hospital. (Id.; doc. 50, p. 9). Dr. Nassar, at all times an employee of UT Southwestern, became the Associate Medical Director of the Amelia Court clinic. The Medical Director of the Amelia Court clinic was Dr. Phillip Keiser, a professor of internal medicine at UT Southwestern. (Id. at pp. 3-4).

In 2004, UT Southwestern hired Dr. Levine as chief of the division of infectious diseases, the division in which Dr. Nassar is employed. (*Id.*). Dr. Nassar alleges that "almost immediately after becoming Chief, Dr. Levine began harassing" him. (*Id*). The factual background related to Dr. Nassar's claims for discrimination and tortious interference is described in this Court's order addressing the claims against the other Defendants (doc. 99[2]); Dr. Nassar

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[2] Dr. Nassar's discrimination claims allege that the treatment he received during the promotion review process at UT Southwestern, together with other acts of retaliation that followed his report of discrimination, led to his constructive

does not allege any conduct by Parkland related to those claims. The sole claim against Parkland is for retaliatory failure to hire in violation of Title VII. (doc. 54, p. 15; doc. 50, p. 22).

A. Dr. Nassar's Negotiations for a Position at Parkland

On March 1, 2006, UT Southwestern's Promotion and Tenure Committee voted to promote Dr. Nassar to the rank of associate professor, to be effective on September 1, 2006. Despite the offer of promotion at UT Southwestern, Dr. Nassar contends that the alleged harassment by Dr. Levine caused him to see the "writing on the wall," leading him to seek employment elsewhere. (doc. 11, p. 5). As early as late 2005, Dr. Nassar began to explore the possibility of working at the clinic as a Parkland employee. (doc. 50, p. 10). Dr. Nassar testified that he had conversations on the subject in April or May of 2006 with Dr. Keiser and Sylvia Moreno, a nurse who is the director of HIV Services at Parkland. (*Id.*). About that time, Defendants contend that Dr. Nassar also began employment discussions with Central

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discharge from UT Southwestern. His claim for tortious interference with prospective contract alleges that UT Southwestern, in retaliation for his report of discrimination, interfered with Parkland's attempt to hire him. (doc. 99). These claims allege conduct by UT Southwestern, and two of its employees, Dr. Fitz and Dr. Levine. Because these claims allege no acts of discrimination or interference by Parkland, this Memorandum Opinion and Order references those allegations only to the extent necessary to provide context for Dr. Nassar's retaliatory failure to hire claim against Parkland.

California Faculty Medical Group where he now practices. (*Id.*).

The parties offer starkly different accounts of the discussions and negotiations that followed. Dr. Nassar alleges that "Dr. Sam Ross, Parkland's Chief Executive,[3] made an offer to Dr. Nassar at a significantly higher rate of pay and Dr. Nassar accepted the position. Dr. Nassar had received the verbal offer, had taken the physical examination for the position, and had been provided with a start date." (doc. 11, p. 6).

Parkland denies that Dr. Ross made any offer, and contends that when Dr. Ross was approached about Dr. Nassar's employment in April 2006, he made an inquiry with Dr. Fitz, UT Southwestern's chair of the department of internal medicine, to determine whether the proposed arrangement was permissible under the Affiliation Agreement between Parkland and UT Southwestern. (doc. 50, p. 11). On April 17, 2006, Dr Ross noted Dr. Fitz's objection in an e-mail to Ms. Moreno. (*Id*; Def.'s App., p. 88). Dr. Ross's e-mail did not include any objection on his or Parkland's behalf, and it did not end the ongoing discussions between Parkland and Dr. Nassar.

Parkland contends that through the months of June and July, Ms. Moreno and Dr. Nassar continued discussion related to the possibility of Dr. Nassar becoming a Parkland employee. (doc. 50, p. 13). These discussions included negotiations of the potential salary. (*Id.* at pp. 13-14). Dr. Nassar

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[3] Dr. Ross's title was Executive Vice President and Chief Medical Officer. (Def.'s App., p 62).

submitted a curriculum vitae on Parklands intranet website on June 20, 2006, but did not submit the other application materials. (*Id.* at p. 11). Parkland admits that prior to preparing a draft offer letter, Henrietta Morgan, a physician recruiter at Parkland, "verbally extended a contingent offer" of employment to Dr. Nassar. (*Id.* at p. 13). Parkland argues that neither Ms. Moreno nor Dr. Keiser (who was a UT Southwestern employee) had any authority to hire any physicians at Parkland. (*Id.* at p. 11).

Parkland contends that on July 5, Dr Ross was presented for his signature a formal offer letter, which was dated July 3, to employ Dr. Nassar. (*Id.* at p. 12). Dr. Ross did not sign the letter and it was never sent to Dr. Nassar. (*Id.* at p. 13; doc. 54, p. 12). The letter had a tentative start date of July 10. (*Id.*).

B. Dr. Nassar's Resignation From UT Southwestern and Move to California

Dr. Nassar alleges that after he was promised a position at Parkland, he submitted his letter of resignation, dated July 3, 2006 and effective September 1, 2006. (doc. 54, p. 10.; doc. 1, Ex. C). In his resignation letter, Dr. Nassar stated "[t]he primary reason of my resignation is the continuing harassment and discrimination against me by the Infectious Diseases division chief, Dr. Beth Levine." He letter further stated "I have been threatened with denial of promotion, loss of salary support and potentially loss of my job," and claimed that his treatment "stems from religious, racial and cultural bias against Arabs and Muslims that has resulted in a hostile work environment." (*Id.*). Dr. Nassar did not provide his resignation letter, which he e-mailed to

various UT Southwestern officials on July 7, to any Parkland personnel. (doc. 50, p. 14).

Dr. Nassar asserts that he was directed in a July 4 e-mail to proceed the next day with the standard health/drug screening required for prospective Parkland. (doc. 54, p. 12). On July 6, when the signed offer letter from Parkland did not arrive, Dr. Nassar followed up with Ms. Morgan. (Id. at p. 15). Parkland contends that Ms. Morgan informed Dr. Nassar that she was still awaiting Dr. Ross's signature. (Id.). The offer letter still had not arrived on July 10, the day on which Dr. Nassar believed he was to start as a Parkland employee. (Id.) In response to Ms. Moreno's request for an update, Dr. Nassar replied by an email of July 10, "I don't have anything new. I got no offer letters and heard nothing from Sam Ross. I guess I am going West." (doc. 50, p. 16; Def.'s App. p. 158).

Parkland argues that Dr. Nassar's e-mail indicates that he was not willing to wait for Parkland to complete the hiring process. (doc. 50, p. 27). Nevertheless, it contends that it "continued processing" Dr. Nassar's application and had not yet made a determination on his employment. (doc. 50, p. 17). Parkland admits that Dr. Fitz mentioned Dr. Nassar's allegation of discrimination to Dr. Ross on or about July 10. (*Id.*)

By email of July 20, Dr. Nassar informed Dr. Ross that he accepted a job in California and listed his Dallas home for sale. (*Id.* at p. 18; Def.'s App., p. 89). In response, Dr. Ross responded with an e-mail that stated "Sorry we could not get it done for you — we are still trying to schedule meeting with Fitz and Levine" (*Id.*). Based in part on Dr. Ross's response,

Dr. Nassar contends that "Parkland ratified UT [Southwestern]'s discriminatory practices by rescinding the employment letter when Dr. Nassar reported the discrimination." (doc. 54, p. 21). Parkland argues that it actively considered Dr. Nassar's application at least until he informed Dr. Ross that he accepted a job in California. (doc. 50, pp. 18, 28). Parkland further asserts that later, on August 9, Dr. Ron Anderson, Parkland's Chief Executive Officer, met with Dr. Nassar to discuss possible employment. (*Id.* at p. 20). Parkland contends that Dr. Nassar indicated he was no longer interested because had already decided to move to California. (*Id.*).

C. Procedural History

Dr. Nassar filed a charge with the EEOC in which he alleged retaliation by Parkland. (Def.'s App. pp. 139-40). He stated that he "was denied employment for a Staff Physician at Parkland C.O.P.C. in retaliation for opposing or engaging in an activity protected under Title VII." (*Id.*). He filed this action on August 4, 2008, bringing claims for "employment discrimination," "tortious interference with business relations," and "exemplary damages." (doc. 11, pp. 8-9). On February 5, 2010, this Court dismissed Dr. Nassar's claims against Defendants Dr. Levine and Dr. Fitz, granted summary judgment on Dr. Nassar's claim for tortious interference, and concluded that fact issues remained regarding Dr. Nassar's Title VII claims against UT Southwestern. (doc. 99). By its motion (doc. 50), Parkland seeks summary judgment on all remaining claims against Parkland.

II.

LEGAL STANDARD

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate when the pleadings and record evidence show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. *Hart v. Hairston*, 343 F.3d 762, 764 (5th Cir. 2003) (per curiam). In a motion for summary judgment, the burden is on the movant to prove that no genuine issue of material fact exists. *Provident Life & Accident Ins. Co. v. Goel*, 274 F.3d 984, 991 (5th Cir. 2001). Once the movant has met its burden, the non-movant must show that summary judgment is not appropriate. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). "This burden is not satisfied with 'some metaphysical doubt as to material facts,' by 'conclusory allegations,' . . . by 'unsubstantiated assertions,' or by only a 'scintilla' of evidence." *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). Instead, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (emphasis in original) (quoting Fed. R. Civ. P. 56(e)). The non-moving party must show that the evidence is sufficient such that a reasonable jury could return a verdict for the non-movant. *Munoz v. Orr*, 200 F.3d 291, 302 (5th Cir. 2000). In determining whether a genuine issue exists for trial, the Court will view all of the evidence in the light most favorable to the non-movant. *Id.* at 301.

III.

ANALYSIS

Dr. Nassar's sole claim against Parkland is for retaliatory failure to hire.[4] Parkland argues that it is entitled to summary judgment because the evidence establishes "that Plaintiff was never refused employment by Parkland."[5] (doc. 50, p. 1). Parkland insists that Dr. Nassar "voluntarily and affirmatively abandoned efforts to be hired by Parkland when he took a job in California before Parkland could finalize the process of considering him for hire." (*Id.*). Dr. Nassar argues that "Parkland ratified UTSW's discriminatory practices by rescinding the employment letter when Dr. Nassar reported the discrimination," making summary judgment improper. (doc. 54, p. 21).

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[4] Dr. Nassar's complaint does not explicitly state which claims are brought against which defendants. (doc. 11). Parkland argues that Dr. Nassar's claims for discrimination and interference are based only on alleged conduct by other defendants. (doc. 50, pp. 1-2). Dr. Nassar does not argue otherwise, but contends that fact issues preclude summary judgment on his retaliation claim against Parkland. (doc. 54, p. 27).

[5] Parkland also argues that Dr. Nassar's properly exhaust or plead a claim for retaliation. (doc. 50, p. 25). The Court finds that Dr. Nassar's retaliation claim was exhausted and properly plead. Because Dr. Nassar's EEOC charge included allegations like and related to those in his complaint, he has exhausted his administrative remedies. *Thomas v. Tex. Dep't of Criminal Justice*, 220 F.3d 389, 395 (5th Cir. 2000). Further, his complaint outlines the factual basis for a claim of retaliation, and need not contain a more precise formulation. *Sweikiewics v. Sorema N.A.*, 534 U.S. 506, 511-512 (2002).

Title VII makes it unlawful to discriminate against an applicant "because he has opposed any practice made an unlawful employment practice . . . or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII. 42 U.S.C. § 2000e-3. "Retaliation claims under Title VII are governed by the familiar three-step *McDonnell Douglas* test." *LeMaire v. La. Dep't of Transp. & Dev.*, 480 F.3d 383, 388 (5th Cir. 2007). First, Dr. Nassar must make out a prima facie case of retaliation. *Id.* (citing *Septimus v. Univ. of Houston*, 399 F.3d 601, 608 (5th Cir. 2005)). If Dr. Nassar is able to establish a prima facie case of retaliation, the burden shifts to Parkland to state a legitimate, non-retaliatory reason for its decision. *Id* (citing *Harvill v. Westward Commc'ns, L.L.C.*, 433 F.3d 428, 439 (5th Cir. 2005)). If Parkland does so, the burden shifts back to Dr. Nassar, who will then have the opportunity to provide evidence that Parkland's reason is untrue and merely a pretext for unlawful retaliation. *Id.*

"To establish a prima facie case of retaliation, an employee must demonstrate that (1) he engaged in an activity that Title VII protects; (2) he was subject to an adverse employment action; and (3) a causal connection exists between the protected activity and the adverse employment action." *LeMaire*, 480 F.3d at 388. A report of discrimination and the filing of an EEOC complaint are protected activities, and Parkland does not challenge the first prong of Dr. Nassar's prima facie case. *Harvill*, 433 F.3d at 439.

Parkland challenges the second prong of Plaintiff's prima facie case, arguing that Dr. Nassar cannot show that he suffered any adverse employment action. (doc. 50, p. 26). To satisfy this prong, a plaintiff "must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Burlington Northern & Santa Fe Ry Co. v. White*, 548 U.S. 53, 68 (2006) (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).

Parkland argues that Dr. Nassar has not presented evidence of any adverse employment action and counters Dr. Nassar's contention that Parkland refused to hire him with evidence that it had not made any employment decision prior to Dr. Nassar announcing that he was leaving for California. (doc. 50, pp. 26 - 27). Parkland contends that even after Dr. Nassar's July 20 e-mail, which gave notice that he had accepted a job in California, it's CEO, Dr. Anderson, continued Parkland's efforts to employ Dr. Nassar. (doc. 50, p. 20). Dr. Nassar argues that "Dr. Ross admitted that Dr. Fitz discussed Dr. Nassar's allegations of discrimination with him during the time period that Dr. Nassar was awaiting written confirmation of his employment at Parkland." (doc. 54, p. 21). He also contends that Dr. Ross could not offer a legitimate non-discriminatory reason for not hiring Dr. Nassar and that "Dr. Keiser confirmed that there was a causal nexus between Dr. Nassar's allegation of discrimination and Parkland rescinding Nassar's employment." (*Id.* at pp. 21-22).

The Court concludes that Dr. Nassar has not presented evidence of an adverse employment action taken by Parkland and thus cannot establish a prima facie case of retaliation. While Dr. Nassar has pointed to fact issues relating to his receipt of an offer of employment from Parkland and alleged interference with that offer from UT Southwestern, he has not presented evidence that Parkland rescinded that offer, rejected his application, or otherwise decided not to hire him. Dr. Nassar has not presented evidence from which a reasonable jury could conclude that Parkland removed his application from consideration or took any other action that is inconsistent with further consideration of his application before Dr. Nassar informed Dr. Ross that he had accepted another job. Dr. Nassar's resignation was to be effective September 1. (doc. 11, Ex. C). Viewed in the light most favorable to Dr. Nassar, the evidence suggests that Dr. Nassar was told that an offer letter with a start date of July 10 was prepared and awaiting approval. However, Parkland has met its burden of establishing that no genuine issue of material fact exists on a crucial element of Dr. Nassar's prima facie case. *Provident Life & Accident Ins. Co.* 274 F.3d at 991. Absent evidence of an adverse employment decision by Parkland, Dr. Nassar cannot establish a prima facie case of retaliation. Accordingly, the Court GRANTS Parkland's motion for summary judgment. (doc. 49).

IV. CONCLUSION

For the reasons stated above, the Court finds that Dr. Nassar has failed to establish a prima facie case of retaliation against Parkland. Accordingly, the

Court **GRANTS** Defendant Parkland Health & Hospital System's motion for summary judgment (doc. 49).

SO ORDERED

SIGNED: February 19, 2010

/s/

JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

JOINT PRETRIAL ORDER,
DKT. NO. 145, MAY 17, 2010

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NAIEL NASSAR, MD, *Plaintiff,* v. UT SOUTHWESTERN HEALTH SYSTEMS a/k/a UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, PARKLAND HEALTH & HOSPITAL SYSTEM, BETH LEVINE, M.D., AND J. GREGORY FITZ, M.D., *Defendants.*	§ § § § § § § § § § § § § § §	Civil Action No. 3:08-CV-1337-B

JOINT PRETRIAL ORDER

* * *

After being promised a position at Parkland, Dr. Nassar resigns from UTSW on July 3, 2006. Dr. Nassar addressed his resignation letter to Dr. Fitz; and, indeed, Dr. Nassar clearly alleged that he had been discriminated against by UTSW and particularly Dr. Levine.

Since Dr. Nassar alleged discrimination in his resignation letter, Dr. Fitz called Dr. Keiser into his office to discuss the discrimination claim and to try and persuade Dr. Keiser to support Dr. Levine. Dr. Keiser told Dr. Fitz that all of the allegations of discrimination made in Dr. Nassar's resignation letter were true. Dr. Fitz then admitted to Dr. Keiser that he would block Dr. Nassar's hire at Parkland and could not give him a positive reference because Dr. Nassar had made a discrimination claim. Dr. Keiser told Dr. Fitz that interfering with Dr. Nassar's position at Parkland would cross the line. But Dr. Fitz admittedly did it any way. Dr. Nassar patiently waited for the offer letter from Parkland, but it never arrived. Dr. Nassar was then forced to take a lower paying job in California that is not even connected to a formal medical school.

Dr. Keiser fully corroborated Dr. Nassar's allegations of discrimination that were made in Dr. Nassar's resignation letter. Dr. Keiser testified:

Q: Okay. And the- and for the jury's convenience, when you said earlier that these are the allegations that you believe are accurate, you're referring to the contents of Exhibit 15?

A ***Yes, particularly, the comment 'Over the past year, I've been threatened with'- 'with denial of promotion, loss of salary support and potential loss of my job. The stated reasons for these threats was a lack of productivity in seeing patients. In this I have been singled out, as other faculty members with similar***

performances have not been subjects to similar threats.'

Q: Okay.

A: ***So, that happened. There's no question that happened.***

* * *

/s/	/s/
ATTORNEYS FOR PLAINTIFF NAIEL ASSAR, M.D.	**ATTORNEYS FOR DEFENDANT UT SOUTHWESTERN MEDICAL CENTER AT DALLAS, BETH LEVINE, AND J. GREGORY FITZ**

So ordered on this 17th day of May, 2010

/s/
UNITED STATES DISTRICT JUDGE

JURY TRIAL EXCERPTS

MAY 17, 2010

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NAIEL NASSAR, MD, *Plaintiff,* v. UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, PARKLAND HEALTH & HOSPITAL SYSTEM, BETH LEVINE, M.D., AND J. GREGORY FITZ, M.D. *Defendants.*	§ § § § § § § § § § § § § §	Civil Action No. 3:08-CV-1337-B

JURY TRIAL

May 17, 2010

Before: The Honorable Jane J. Boyle
United States District Judge

CERTIFIED TRANSCRIPTION

I, Shawnie Archuleta, CCR/CRR, certify that the foregoing is a transcript from the record of the proceedings in the foregoing entitled matter.

/s/

July 30, 2010

* * *

[75]

PHILLIP KEISER, M.D.,

having been first duly sworn, testified as follows:

* * *

DIRECT EXAMINATION

BY MR. LAUTEN:

* * *

[83]

Q. Okay. At some point in time, did you eventually come to work in the HIV clinic, Amelia Court?

A. Yes. I started worked in the HIV clinic at Parkland in 1993. After I had been there a year, I did that one day a week. And then in 1995, the clinic moved to Amelia Court and I became the medical director at the HIV clinic at Amelia Court.

Q. You said you became the HIV director at Amelia Court. What year was that?

A. 1995.

Q. Okay. From 1992, when you were first hired at UT Southwestern, how long did you work for UT Southwestern until you left to go somewhere else?

A. Sixteen years.

Q. Okay. So for 16 years you were an infectious disease doctor at Southwestern?

A. That's correct.

[89]

Q. At the time that Dr. Nassar was hired in 2001, what was your position at that point in time at UT Southwestern?

A. I was the director of the HIV clinic at Amelia Court.

* * *

[156]

Q. Now I want to shift to a different area.

Did Dr. Akbar get a position somewhere else?

A. Yes, he did.

Q. Where did Dr. Akbar go to work after this UT Southwestern issue?

A. He went to work for Parkland.

Q. Okay. When you say he went to work for Parkland, where at Parkland did he go to work?

A. He worked in the HIV clinic in Parkland.

Q. Okay. And explain how you can work in the HIV clinic at Parkland, how does that — how does that mesh with where you were working and Dr. Nassar was working during that same kind of time period?

A. Parkland and University of Texas have a relationship where most of the physicians who work at Parkland are UT Southwestern employees. However, in some cases, Parkland does hire its own doctors who work directly for Parkland. And the advantage to doing that is several: One is that they can devote all of their time to taking care of patients; they don't have to be involved in teaching and

research activities; they get paid a higher salary, so the salary is better.

The negative part of that is that they — you know, they are not teachers, they are not on faculty. It's not generally perceived — it's not as prestigious a position. But he took a job working in the HIV clinic as a Parkland employee as opposed to being a UT Southwestern employee.

Q. Does that mean, as I understand it, that Dr. Akbar is working in the same clinical office that you are, he's just being paid by Parkland instead of Southwestern?

A. Yes.

* * *

[170]

Q. Now I want to fast-forward to the time period after July of 2006, after the resignation letter. Did you have a meeting with Dr. Greg Fitz after this letter was authored and disseminated by Dr. Nassar?

A. Yes, I did.

THE COURT: Excuse me.

MR. GIBSON: Your Honor, this is subject to the limine motion.

(Discussion held at the bench off the record.)

MR. LAUTEN: Dr. Keiser, can you come around here, please?

(Discussion continued at the bench off the record.)

THE COURT: I will tell you while we are waiting, we have made significant progress today. It's good to

already get through the opening statements and part of a witness any time. Sometimes it takes the whole day just to pick the jury, so we are moving well.

MR. LAUTEN: Thank you, Your Honor. Sorry for the interruption.

THE COURT: That's all right. Dr. Keiser, if you will come back up to the stand and we will continue.

Q. (By Mr. Lauten) Dr. Keiser, at the break — and I apologize for the interruption — we were talking about a meeting with Dr. Fitz sometime after July of 2006. Do you remember me asking about that?

A. Yes, I do.

Q. Did you have a meeting — first of all, who is Dr. Fitz?

A. Dr. Fitz was the chief of medicine at UT Southwestern at that point. He was both Dr. Levine's and my supervisor, so he would have been the next level up.

Q. Okay. When you say he was your supervisor, did he have the authority to — excuse me. Sorry. Did he have the authority to fire you at that point in time?

A. I would say so, yes.

Q. He was your direct superior?

A. I mean, it was delegated authority to Dr. Levine, but yes, he was the authority in the Department of Medicine.

Q. Tell us how this meeting came to fruition. What happened? What were you — how did it go down?

A. So on, I believe it was — so Dr. Nassar sent that letter on July 3rd. And I believe the Fourth of July weekend was actually on the weekend, and Monday was a holiday. So that Monday or Tuesday, Dr. Fitz asked me to come to his office.

I go in, and he says, have you seen Dr. Nassar's letter?

And I said, yes, I have.

And he says, it's shocking, isn't it? Shocking.

And I said, yes, it is.

And he said, you know, Beth, Dr. Levine, was publicly humiliated by that letter because Dr. Nassar sent it to other people other than just Dr. Fitz.

I said, I can understand why she would feel that way.

And he said, well, since she was publicly humiliated, it's very important that she be publicly exonerated. What do you think?

So, like a dummy, I told him what I thought. I told him that the facts in that letter are true, that he was threatened with denial of promotion; he was threatened with pay loss, all of those things happened, but the meaning behind it could certainly be up to interpretation.

He then said to me that — that — you know, before he wrote this letter, I would have said about him, he's a good guy. Not a problem. You know, if he wants to go somewhere else, that's fine. But after that, because of what he wrote in that letter and the

way he disseminated, that's unprofessional. I couldn't possibly give him a good recommendation after that.

We then talked a little bit more, and I said to him that I was concerned that Dr. Levine was bigoted against him and that she may not even be aware of her actions; she may just — you know, sometimes people do things they are not even sure why they are doing it. He then didn't seem real interested in that argument.

I then brought up an issue that I was aware that he was trying to get a job at Parkland. In fact, he resigned to take a job at Parkland. And he said to me, yeah, yeah, I put a stop to that.

And I said, can I give you some advice?

And he said, yeah, that's what you're here for.

And I said, up to this point there is a lot of he-said she-said, and it's difficult to prove, you know, what's going on. But if you interfere with him getting a job, that would be crossing a line. My advice to you is, let him be, let him take that job.

And he kind of smiled at me and said, technically, it wouldn't be me not giving him the job, it would be Parkland not giving him the job.

That's when I left. Conversation over.

Q. Did — at the time that Dr. Nassar put in his resignation in July of 2006, did you understand that he was seeking employment in the exact same job he was currently in but being employed by Parkland?

A. My understanding was that he was not only seeking employment, that he had been verbally

offered a job, that he had a start date the first week of July, and all he was waiting for was a formal offer letter signed by the physician and chief at Parkland.

Q. If Dr. Ross had — sorry, strike that. I apologize.

If Dr. Nassar had gotten the offer at Parkland, would he have been in the exact same job he was in at Southwestern, just being paid by a different employer?

A. Pretty much; slightly different duties, but essentially same job.

Q. Okay. And I showed you Exhibit 15, that resignation letter. Do you remember that?

A. Yes.

Q. Did you see in the bottom of that letter where Dr. Nassar praises Dr. Fitz?

A. Yes, I think he thanked him for his support.

Q. Did you see in that letter where Dr. Nassar talked about how great Dr. Fitz had been to him?

A. Yes.

Q. Did this meeting you had with Dr. Fitz, where he said, I'm going to put a stop, I'm going to block that, did that happen after the letter?

A. Yes, it did.

Q. Okay. So after Dr. Nassar alleged that he had been discriminated, whether that's true or not, after that happened Dr. Fitz said what with respect to Dr. Nassar trying to get that job at Parkland?

A. He said that he put a stop to it and the reason was was because of the letter.

Q. Did you understand Dr. Fitz to say that he had blocked the position because he alleged he was discriminated against?

MR. GIBSON: Objection, Your Honor, leading question.

THE COURT: Rephrase; sustained.

Q. (By Mr. Lauten) Did you take Dr. Fitz's comments to be a response to the letter that was Exhibit 15 that I showed you?

A. He said quite clearly after that letter, I would not give him a good letter of recommendation — I would not give him a recommendation for a job.

Q. Did Dr. Nassar get the job at the Parkland?

A. No, he did not.

Q. Did Dr. Nassar want to go to Parkland, to your knowledge?

A. Yes, he did.

Q. Did Dr. Nassar want to stay in Texas, to your knowledge?

A. Yes, he did.

* * *

[179]

Q. (By Mr. Lauten) Did you believe that Dr. Fitz was retaliating against Dr. Nassar for making that allegation of discrimination?

A. Yes, I did.

Q. Why do you feel that way?

A. Because he said so.

Q. Okay. Did you have a conversation with Vernon Mullen about these allegations?

A. Yes, I did.

Q. Who was Vernon Mullen?

A. Vernon Mullen is the Equal Opportunity Officer for UT Southwestern Medical Center.

Q. In 2006, was he an employee of UT Southwestern?

A. Yes, he was.

Q. Okay. What did Vernon Mullen tell you about these allegations of Dr. Nassar?

A. Vernon Mullen was charged with investigating some of Dr. Nassar's complaints. He spoke to me regarding these. I told him the story about how I had met with Dr. Fitz and what Dr. Fitz had said. I told him what had been going on with Dr. Levine.

Then he made a very curious statement. He would say, you can see after — let's just say for the sake of argument. You can see that, after sending a letter like this, how Dr. Nassar could no longer continue to work here. Can't you?

And I said, well, I understand what you are saying, but this is America and people can say what they want and, you know, his speech is protected.

And he said, well, you know, let's just say for the sake of argument Dr. Fitz made that statement. And he did, he told me that he did — that's what Vernon Mullen said to me. And he did, he told me that he

did. Let's just say, for the sake of argument, you could see that if you — and he actually leans over the desk at me — if you were to make statements like that, you could see how you could no longer work at UT Southwestern, can't you? And I really felt like he was not only verifying what Dr. Fitz said, I felt like I was being threatened, I was being told to be quiet.

* * *

JURY TRIAL EXCERPTS

MAY 18, 2010

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NAIEL NASSAR, MD, *Plaintiff,* v. UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, PARKLAND HEALTH & HOSPITAL SYSTEM, BETH LEVINE, M.D., AND J. GREGORY FITZ, M.D. *Defendants.*	§ § § § § § § § § § § § § §	Civil Action No. 3:08-CV-1337-B

JURY TRIAL

May 18, 2010

Before: The Honorable Jane J. Boyle
United States District Judge

CERTIFIED TRANSCRIPTION

I, Shawnie Archuleta, CCR/CRR, certify that the foregoing is a transcript from the record of the proceedings in the foregoing entitled matter.

/s/

July 30, 2010

* * *

[16]

PHILIP KEISER, M.D.,

having been previously sworn, testified as follows:

CONTINUED DIRECT EXAMINATION

BY MR. LAUTEN:

* * *

[23]

Q. Did you — one of the allegations that Southwestern has made is that that affiliation — are you familiar with this affiliation agreement between Parkland and Southwestern?

A. Yes, I am.

Q. Okay. And I will represent to you that one of the allegations Southwestern has made is that this affiliation agreement required UT Southwestern's consent to hire Dr. Nassar. I want you to assume that. Can you do that?

A. Okay. Yes.

Q. The question I want to ask you is: To your knowledge, did Parkland ever hire physicians before or after Dr. Nassar without consulting with Southwestern?

A. Yes.

Q. Okay. And give me some examples, to your knowledge, of doctors that were hired by Parkland

without going and getting the blessing of UT Southwestern. Do you know any examples?

A. Yes. So there's Dr. Laura Armas, who is a physician at Parkland. She still works in the clinic and treats HIV patients. She was the first one that was hired. That was several years before Dr. Nassar.

Then there was a Dr. Bernal, who was also hired. And she saw patients in the HIV clinic. And then Dr. Nassar was — well, we wanted to get Dr. Nassar hired, and that didn't happen; and then Dr. Morris-Harris after that. And then Dr. Muhammad Akbar was actually hired by Parkland after his hiring with UT Southwestern didn't go through.

Q. And I want to just — I don't want to spend much time with this, but with respect to Dr. Akbar, did they ever have to go to Dr. Fitz and get his approval to hire Dr. Akbar at Parkland?

A. Not that I'm aware of.

* * *

[30]

Q. Is this type of conduct that you've seen consistent with retaliation against Dr. Nassar?

A. I believe he was retaliated against. He had a — he basically had an agreement to start work the next week, and that agreement just disappeared after he sent that letter. And you know, I don't see it as anything but direct retaliation for the fact that he embarrassed Dr. Levine and that she was angry and she wanted to get her — her pound of flesh out of him. And she enlisted the full weight of the University to do that, and it came down on him.

Q. Since 2004, when Dr. Levine came from New York and was hired as chief of infectious diseases, how many doctors had been hired in infectious diseases that have a Muslim background?

A. I'm not aware of any. I don't know everybody's religious background, but I am not aware of any, and I don't think there has been any.

* * *

[34]

CROSS-EXAMINATION

BY MR. GIBSON:

* * *

[94]

Q. You also spoke yesterday about Dr. Nassar's application for employment at Parkland; isn't that correct?

A. Yes.

Q. And you were aware, weren't you, that Dr. Fitz did not support Dr. Nassar going to Parkland as early as April of 2006, weren't you?

A. No.

Q. No one ever told you that Dr. Fitz opposed Dr. Nassar going to Parkland as early as April.

A. I don't recall that, no.

Q. Dr. Nassar never told you.

A. I — I don't remember.

Q. But your claim is that Dr. Fitz — Dr. Fitz's position was in response somehow to Dr. Nassar's resignation letter. That's your claim.

A. That's what he told me.

Q. But you weren't aware that Dr. Fitz was taking the position as early as April that Dr. Nassar should not go to Parkland, were you?

MR. LAUTEN: Objection, asked and answered.

THE COURT: Overruled.

A. I don't recall. I have no memory of Dr.— well, Dr. Fitz never told me that; and if other people had said that, I have no memory of that.

Q. (By Mr. Gibson) So you have no reason to dispute that, correct?

A. I have no knowledge of that.

Q. And you never spoke to Dr. Ross, who was the medical director at Parkland. Am I getting that correctly?

A. He was chief medical officer.

Q. Chief medical officer, thank you. You never spoke to Dr. Ross about why Dr. Nassar did not go work at Parkland, did you?

A. No.

Q. Dr. Nassar's family, his wife and son, live in California, don't they?

A. Yes.

Q. Now Dr. Nassar lives in California.

A. Yes.

Q. But previously, in the 2005/2006 time frame, his wife and son lived there as well, at that time.

A. Yes.

Q. You testified yesterday that when Dr. Nassar first left UT Southwestern in 1998 it was for personal reasons related to his family; isn't that correct?

A. Yes.

Q. And then he resigned from UT Southwestern a second time in July of 2006, correct?

A. Yes.

Q. And you wouldn't dispute — if Dr. Nassar said that part of the reason he left was for family reasons, you wouldn't dispute that, would you?

A. I'm not sure. What time frame are you asking?

Q. In July of 2006, if Dr. Nassar said part of the reason he was leaving was for family reasons, you wouldn't dispute that, would you?

A. He never said that to me.

* * *

[120]

REDIRECT EXAMINATION

BY MR. LAUTEN:

[122]

Q. So after you went to Dr. Fitz and said — said that you had this meeting about him being Muslim and the offer not being right, the letter you were shown only came after that, true?

A. The letter that I saw today came after I had that conversation with Dr. Fitz, yes.

Q. And when the letter was sent in August with the higher figure, do you know why Dr. Akbar didn't accept it?

A. He told me that when he called to accept it he was told the offer had been withdrawn because he had taken too long to respond.

Q. Did Dr. Akbar ever become employed at Southwestern?

A. No.

Q. And during this June to August time frame — and this is again 77, that you were shown a few minutes ago — do you recall Dr. Levine e-mailing you, trying to get him sold on the Parkland job?

A. Yes. This e-mail was sent to me from Beth Levine, and she was asking for Dr. Akbar's number. She wanted to talk to him because she didn't want to hire him, and she was trying to push him to take a job at Parkland as opposed to take a job at UT Southwestern.

Q. And you wrote back — and this is, again, 77 — and what did you tell Dr. Levine about what his interest actually was?

A. I said in this e-mail that he was solely interested in the faculty position. He wanted to be a teacher in addition to seeing patients, so he was solely interested in the faculty position and wasn't interested in working for Parkland.

Q. And the comment that you told us yesterday about, they have hired another one of those, when was that comment made in contrast to the date of these e-mails?

A. It was after he had already taken a job at Parkland.

* * *

[134]

SYLVIA MORENO,

having been previously sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LAUTEN:

* * *

[136]

Q. Are you familiar — as the former HIV Services director, were you exposed to Dr. Nassar's abilities as a physician and that sort of thing?

A. Yes, I was.

Q. And how were you exposed to seeing Dr. Nassar's abilities in the HIV clinic?

A. As a director, I oversaw the patient appointment system internally at Parkland, the billing, the management of the services, patient services, hiring, firing, the entire spectrum of management for the HIV program at Parkland.

And Dr. Nassar saw patients in our clinic every day — almost every day, unless he had to do other

duties at the medical school, then he wasn't present. But he saw an incredible amount of patients compared to other physicians.

Q. How would you characterize Dr. Nassar as a physician, as a nurse and as someone who was in charge of the HIV Services?

A. Dr. Nassar had an excellent reputation with the staff. The staff was very trusting of him. They felt that they could approach him at any time with any patient issue, whether the patient was scheduled for appointments or not, walk-in patients. He was just very approachable, and they felt comfortable talking with him about these cases versus some of the other physicians that had a different approach to patient care.

Q. Did you consider Dr. Nassar a good doctor?

A. Dr. Nassar is an excellent doctor.

* * *

[137]

Q. I want to turn your attention to this July 2006 time frame. Did there come a time when Dr. Nassar sought employment from Parkland?

A. Yes.

Q. Okay. What was your position at Parkland during that time frame?

A. The director of HIV Services.

Q. And as director of HIV Services, would you have worked at Parkland in the hiring process with Dr. Ross?

A. Yes. Well, it's unusual that I would involve Dr. Ross, but under these circumstances, I did.

Q. Tell the jury a little bit about what involvement you actually had in the paperwork of trying to bring on a new employee in this July 2006 time frame.

A. I would have been responsible for posting the position and making sure and communicating with Medical Staff Services, who does the hiring of the physicians; that they understood the type of physician that we were interested in placing in the position.

And I also would be involved in getting — helping them with negotiation of salary and getting approvals from the vice president for the area if the salary was above a certain set point, which for us is a midpoint.

Q. Did — did you actually have hands-on involvement in the paperwork of Dr. Nassar applying for a position?

A. Only insofar as the paperwork that my department would be responsible for preparing, which we did, we prepared the HR action form, the EEOC form. There were various forms that we did that I had prepared. And something like the letter of offer, that would come from the Medical Staff Services department.

MR. LAUTEN: Can I approach the witness, Your Honor? This is Exhibit 16.

THE COURT: You may.

Q. (By Mr. Lauten) Ms. Moreno, I want to show you Plaintiff's Exhibit 16. Do you recognize that document?

A. Yes, I do.

Q. Is that a true and correct copy of an unsigned offer letter to Dr. Nassar from Parkland?

A. It's in the format of an offer letter, yes.

Q. Is that letter similar to the type of offer letters Parkland sends to potential employees in the regular course of business?

A. Yes.

Q. Okay. And is that a true and correct copy of an unsigned offer letter dated July 3rd, 2006, from Parkland?

A. Yes.

Q. And is that the type of document that would be generated by Parkland in the ordinary course of business when you have a new applicant?

A. Yes, it is.

MR. LAUTEN: Your Honor, I would offer 16.

THE COURT: Any objection?

MR. GIBSON: This is an unsigned document —

THE COURT: Any objection?

MR. GIBSON: Yes, Your Honor.

THE COURT: What's the basis?

MR. GIBSON: I think it's hearsay.

MR. LAUTEN: Your Honor, it's a Parkland record that was generated in Parkland's business, and she's the custodian of that particular document. I can lay a little bit of —

THE COURT: Custodian — again, I think you will need to give me more to establish this is a business record.

MR. LAUTEN: Sure. Can I approach?

THE COURT: Go ahead.

Q. (By Mr. Lauten) I want to ask you a few more questions about Exhibit 16, Ms. Moreno. Was that document prepared at or near the date on the document?

A. Was it prepared around the date —

Q. At or near the date — there's a date on that document, correct?

A. Yes, July 3rd.

Q. Okay. Would that document be prepared at or near the date listed on the document?

A. It was prepared around the date of my HR action form and in-hire forms for this position, yes.

Q. And you would be the custodian of a document like this in the application process; is that correct?

MR. GIBSON: Your Honor, objection, this is leading questions.

THE COURT: Overruled. It's all right under Rule 611, in the Court's view.

A. I did not prepare this document.

Q. (By Mr. Lauten) Right.

A. But I have seen other offer letters that are in this format that appear to routinely not be signed.

Q. Okay. And you brought my next question. Are these types of documents routinely created by Parkland in the regular course of a business activity?

A. By Medical Staff Services, yes.

Q. And do you recognize that particular document, Exhibit 16, as being that type of document?

A. Yes, I do.

Q. Okay. And would this have been the type of document, the language included in it be the type of language that would be transmitted to an applicant who might be accepting a job?

A. Yes.

Q. Is it part and parcel of your job in the HIV Services to generate and transmit these types of documents at Parkland in the hiring process?

A. Yes, but I didn't have — manage this document.

Q. Okay.

MR. LAUTEN: I would offer 16, Your Honor.

THE COURT: Mr. Gibson?

MR. GIBSON: Same objection, Your Honor. We also have a relevance objection under the objections we have made previously.

THE COURT: Plaintiff's Exhibit 16 is admitted as a business record, and I think your objections would go

more to the weight. You can certainly cross-examine her about that.

(Plaintiff's Exhibit 16 admitted into evidence.)

MR. LAUTEN: Publish Exhibit 16, Your Honor?

THE COURT: You may.

Q. (By Mr. Lauten) Ms. Moreno, can you see Exhibit 16 on the screen?

A. Yes.

Q. And does this letter — is this the type of letter that Parkland sends when a new doctor has been hired?

A. It's an offer letter.

Q. And this particular letter is addressed to Dr. Nassar, right?

A. Yes.

Q. And does it include a salary?

A. Yes.

Q. Does it talk about the liability for physicians and that sort of thing?

A. Yes.

Q. And does it basically say, if this meets your approval, sign and send back?

A. Yes.

Q. What is the only thing missing from this offer of hire letter to Dr. Nassar?

A. Dr. Nassar's signature.

Q. And who else's signature?

A. Sam Ross.

Q. Okay. Did you have conversations — let me ask you this: Do you know why Dr. Nassar was not hired at Parkland?

A. Insofar as what was discussed with me from conversations at that time with Dr. Keiser.

Q. Okay. And why is it that Dr. Nassar did not start at Parkland on July 10, 2006, if you know?

MR. GIBSON: Objection, asked and answered.

THE COURT: Overruled.

A. Because I had at least two conversations with Dr. Ross, because he was telling me he needed to approach Dr. Fitz at UT Southwestern to get his blessing to hire Dr. Nassar.

Q. Okay. Did Dr. Fitz give his blessing for Dr. Nassar to go work at Parkland?

MR. GIBSON: Objection, Your Honor, hearsay.

THE COURT: Overruled. And you can't just guess about that. It would have to be based on something. Perhaps you should lay a further foundation. All right?

MR. LAUTEN: Yes, ma'am.

Q. (By Mr. Lauten) Let me take smaller steps here.

At the time this July 3rd letter was created, did Dr. Nassar need to do anything else to pursue employment at Parkland?

A. No, he did not.

Q. Okay. Did Parkland need anything else from Dr. Nassar other than Dr. Ross' signature to come be an employee?

A. No. I know that the salary had been negotiated by Dr. Nassar with Medical Staff Services from an e-mail that I have, so I know the salary was set. And there may have been a need to do some health screening, but generally that's not done until the potential applicant agrees to come on as an employee.

Q. Did — did you — I'm trying to think of the best way to ask it. Let me just go to this exhibit. Let me back up. During this July 2006 time frame, how would you characterize the need for a position to be filled? Was there an urgent need, no need, some need, how would you describe it?

A. It was an urgent need.

Q. Okay.

A. Because Dr. Nassar was almost working full time in the clinic. He had a large patient caseload, and those patients needed to be taken care of. So we were urgently trying to bring him on board as soon as possible. I mean we rushed to do the paperwork to bring him on. I have that paperwork that shows the dates and the salaries and when he was supposed to start. The administrative acception signed by the vice president agreeing to the salary, everything was set.

Q. And what was the holdup?

A. The response from Dr. Ross that he had spoken with —

MR. GIBSON: Objection, Your Honor.

THE WITNESS: — with Dr. Fitz.

MR. GIBSON: Objection, this is hearsay.

THE COURT: Overruled.

Q. (By Mr. Lauten) Tell the jury what Dr. Fitz said with respect to Dr. Nassar trying to get hired.

MR. GIBSON: Same objection, Your Honor.

THE COURT: I need to establish how she knows that, because I thought you were talking about knowing what Dr. Ross said.

Q. (By Mr. Lauten) Let me back up. Are you familiar with what the holdup was with trying to get Dr. Nassar hired at Parkland?

A. Yes.

Q. How were you familiar with what was holding up the practice?

A. Dr. Keiser told me that he had a conversation with Dr. Fitz.

Q. And did anyone tell you that Dr. Fitz needed to bless the hiring of Dr. Nassar at Parkland?

A. No.

Q. Okay. Did Dr. Fitz ever bless the hiring of Dr. Nassar at Parkland?

A. Not that I know of.

MR. LAUTEN: Can I approach the witness, Your Honor?

THE COURT: You may.

MR. LAUTEN: This is Exhibit 18.

THE COURT: Plaintiff's?

MR. LAUTEN: Plaintiff's 18.

THE COURT: It's in. Sorry, it's not in. My mistake.

Q. (By Mr. Lauten) Is Plaintiff's Exhibit 18, is that a true and correct copy of an e-mail you sent in June of 2006?

A. Yes, it is.

Q. Was that e-mail sent from your Parkland e-mail address?

A. Yes.

Q. Does that e-mail reflect the state of mind that you had at the time with respect to what was going on with Dr. Nassar?

A. Yes, it does.

MR. LAUTEN: I would offer Exhibit 18.

THE COURT: Mr. Gibson?

MR. GIBSON: Your Honor, we would object —

THE COURT: Sustained, it's hearsay.

Q. (By Mr. Lauten) Did you ever tell Dr. Nassar how you felt about the way this hiring process went?

A. Yes, I did. I told him that I was very distressed about this and that I greatly sympathized with what he had been through and that I had had similar experiences.

Q. Did you describe this as the most bitter thing you had ever seen in 30 years?

A. Yes, one of the most bitter experiences I've had.

Q. And when you said it was one of the most bitter experiences you've had in over 30 years at Parkland, what did you mean by that?

A. I was distressed over the fact that we could easily have had a very experienced physician, board certified in internal medicine and infectious diseases, great bedside manner, an expert in his field, recognized nationally, that could have come on board at Parkland to take care of our patients. He wanted to do that. He rarely sent patients to the emergency room. He saw all the patients he could. He respected Parkland Hospital policies and procedures. He respected the management at Parkland, and it was a tremendous loss for us.

THE COURT: Question.

Q. (By Mr. Lauten) And you talked about this urgent need to fill the position. Why was there an urgent need to fill this position?

A. Because we have sick patients, and they need to be seen.

Q. How long did the position remain unfilled?

A. It remained unfilled until January of '07.

Q. Okay. So for seven months, there was no doctor in that position?

A. Correct.

Q. Okay. And when that position was filled seven months later, who filled the position that Dr. Nassar sought in July of 2006?

A. Dr. Deborah Morris-Harris filled the position.

Q. Is Dr. Harris an infectious disease specialist?

A. No.

Q. Did Dr. Harris have any infectious disease training?

A. None.

Q. Not to take anything away from Dr. Harris, how would you characterize and contrast the experience of Dr. Harris with the experience of Dr. Nassar in the field of infectious disease?

A. Well, there's no comparison.

Q. And no comparison in which direction?

A. She had no training. She had very minimal experience/exposure to HIV patients. She was an emergency room physician, and we did on-the-job training with her.

Q. Having Dr. Nassar not in that position, having this six- to seven-month gap, how did that affect patient care?

A. Well, generally what we do is we have to redistribute the patients to new providers. Some of them were sent to different HIV clinics that we have in the community, and some of them stay at the large HIV clinic on the main campus. But that sort of thing we try to avoid because it's very distressful to the patients to lose their primary care provider.

Q. And in July of 2006, when Dr. Nassar was pursuing employment at Parkland, how many other applicants were there for the position, if any?

A. There were none.

Q. He was the only applicant?

A. Yes.

Q. And if he wasn't hired, the position was just going to remain unfilled until January?

A. Yes.

Q. How is it that Parkland was able to hire a physician — and again, not to take anything away from this doctor, but how was it that Parkland was able to hire someone to work in infectious disease that wasn't an infectious disease doctor?

A. Well, the position that we posted was an internal medicine staff position. It wasn't posted as that of an infectious disease.

Q. But am I correct, Ms. Moreno, that the position was to work in the HIV clinic?

A. Yes.

Q. And is the HIV clinic in the infectious disease area of medicine?

A. Yes.

Q. Okay.

MR. LAUTEN: May I approach the witness, Your Honor?

THE COURT: You may.

Q. (By Mr. Lauten) This is Exhibit 48. Ms. Moreno, is this an e-mail that you sent on the 4th of July to Dr. Nassar about the application process?

A. Yes, it is.

Q. And did you send that e-mail — without going into the contents, did you send that e-mail to Dr. Nassar in furtherance of your job of processing the paperwork for employment?

A. Yes.

Q. Okay. And was it part and parcel of your job to make sure that certain checklists were checked off in order to exhaust all of the requirements to become employed?

A. Yes.

Q. And did that include like going to HR, doing a drug screen, those sorts of things?

A. Yes.

Q. Does that e-mail reflect that process you were going through?

A. Yes, it does.

Q. And does that e-mail document the steps that you were following in trying to get Dr. Nassar hired at Parkland?

A. Yes, it's within the days that we completed all the in-hire paperwork for him.

MR. LAUTEN: Offer 48, Your Honor.

THE COURT: Mr. Gibson?

MR. GIBSON: Objection, hearsay and relevance.

THE COURT: Sustained.

Q. (By Mr. Lauten) Did you — were you working at Parkland on the 4th of July in 2006?

A. Yes.

Q. Can you tell the jury why you were contacting Dr. Nassar about doing all this stuff on a national holiday?

A. Well, again, because we were urgently trying to get everything done so that we would be positioned to be able to hire him and have him start on July 10th.

Q. Is the 4th of July usually a holiday for you?

A. Yes, it is.

Q. And you were actually e-mailing Dr. Nassar from work on a national holiday because you were trying to speed up the process, weren't you?

MR. GIBSON: Objection, Your Honor, leading.

THE COURT: Sustained; rephrase the question.

MR. LAUTEN: Sure

Q. (By Mr. Lauten) Why is it that you were contacting Dr. Nassar on the 4th of July holiday about coming to work at Parkland? Why couldn't it wait until after the holiday?

A. It couldn't wait until after the holiday. All the paperwork had to be in line. Everything had to be signed off. We had to be ready to submit it to HR. And I needed him to have his health screening and go to occupational health as soon as he could so that that would be done. It's got to be done before the start date, and the start date we were working with was July 10th.

Q. And did you do everything you could to try to get this process sped up so that he could come to work on July 10th?

A. I did everything I could. And it was very disappointing to me to see Sam Ross leave Dallas and have this still unaddressed.

Q. And when you say Dr. Ross left Dallas, what do you mean?

A. He took a job in another city.

Q. Okay. And who was Dr. Ross?

A. He was the chief medical officer.

Q. Okay.

THE COURT: For Parkland?

THE WITNESS: Parkland Hospital, yes.

* * *

[157]

MR. LAUTEN: May I approach the witness, Your Honor?

THE COURT: You may.

MR. LAUTEN: This is Exhibit 52A.

Q. (By Mr. Lauten) Ms. Moreno, is Exhibit 52A a true and correct copy of an e-mail between you and Ms. Morgan with respect to the hiring of Dr. Nassar?

A. Yes, it is.

Q. Okay. And was that the type of e-mail that you sent in furtherance of getting the paperwork done for Dr. Nassar to come to work?

A. Yes. These documents referenced in this e-mail are exactly the ones I have for him.

Q. That's a true and correct copy?

A. Yes.

MR. LAUTEN: I would offer Exhibit 52A, Your Honor.

MR. GIBSON: The only objection we have is the relevance objection as previous.

THE COURT: Overruled. Plaintiff's Exhibit 52A is admitted.

(Plaintiff's Exhibit 52A admitted into evidence.)

MR. LAUTEN: Sorry, Your Honor, can I publish 52A?

THE COURT: You may.

Q. (By Mr. Lauten) And this e-mail is dated July 3rd, 2006. Do you see that?

A. Yes.

Q. And up here at the top it says: We are planning for everything to be in place by this date. Do you see that?

A. Yes.

Q. And then it says: Dr. Ross will be here on Wednesday, and he can sign off on the offer letter. Do you see that?

A. Yes.

Q. Okay. What else needed to be done, if anything, to get Dr. Nassar at Parkland?

A. Well, again, I would say I did everything I needed to do to employ him. Medical Staff Services did everything they needed to do to employ him.

Q. Do you recall, Ms. Moreno, that on July 3rd, 2006, this same date is this e-mail that Dr. Nassar sent a letter to UT Southwestern claiming he had been discriminated against?

A. I'm sorry, you're asking if I knew he sent it that day?

Q. Let me ask it a better way: Do you have any information about whether Dr. Nassar reported discrimination to UT Southwestern?

A. From conversations at that time with Dr. Keiser.

Q. Okay. And after that letter was sent on July — have you ever seen that letter?

A. No, I have not.

Q. Okay. After that letter was sent on July —

THE COURT: Hold on, there is an objection.

MR. GIBSON: I would object to facts not in evidence that that letter was sent July 3rd. And in fact, I'm happy to go to a sidebar to explain the objection more clearly.

THE COURT: No, let's skip over that and stay off that topic and move ahead, please.

Q. (By Mr. Lauten) Did you ever feel like, Ms. Moreno, that Dr. Fitz and the medical school was holding up Dr. Nassar's ability to come work?

A. Yes.

Q. Okay. Why did you feel that way?

A. Because Dr. Ross clearly told me that he needed to have Dr. Fitz's blessing for us to employ Dr. Nassar.

Q. Did you feel like at any point in time — and you were there during this whole process, weren't you?

A. Yes.

Q. Did you feel like at any point in time that Dr. Fitz and the medical school was retaliating against Dr. Nassar?

MR. GIBSON: Objection, Your Honor, calls for a legal conclusion.

THE COURT: Overruled. Obviously Ms. Moreno is not here as a lawyer. This is just a lay person's interpretation of the word retaliate.

A. Yes, I did.

Q. You felt like they were retaliating against him? Why?

A. He had told me he was unhappy at the school; that he was uncomfortable with various situations with Dr. Levine; that he no longer wished to be employed there; that he wanted to be employed at Parkland and just do patient care.

I also had conversations with Dr. Keiser, who talked to me about his resignation letter and the content. And difficult — it was very difficult for me to believe, but I pressed on, trying to get him employed at Parkland.

Q. Did you continue to try to get him hired?

A. I continued until the very end.

Q. Did you feel like Dr. Nassar was patient with Parkland in trying to come to work there?

A. He was very patient. He's always been very courteous with me. He's always was very approachable.

Q. In your dealings with Dr. Nassar, did he always respect your religious beliefs and that sort of thing?

A. He was always very respectful of everyone.

Q. You never saw him try to impose his religious beliefs on you or anything like that?

A. Never.

Q. Can you think of any legitimate reason why Dr. Nassar couldn't come to work at Parkland based on his qualifications and expertise?

A. There is no legitimate reason.

MR. LAUTEN: Can I approach the witness, Your Honor?

THE COURT: You may.

MR. LAUTEN: It's Exhibit 54A.

Q. (By Mr. Lauten) Without going into the contents of 54A, is this an administrative request that goes with the application process for becoming an employee?

A. Yes, this is an administrative exception form for an employee or a potential employee requesting a salary higher than the midpoint.

Q. Is that the type of document that's generated in the regular course of business when you have a particular physician applying for employment?

A. Yes, it is.

Q. Is that kind of like a standard Parkland form?

A. Very standard.

Q. That's the kind of form you would have on your computer system?

A. Yes.

Q. And that's just a printout inserting the data with respect to this potential new hire, true?

A. Yes.

Q. These are the kinds of documents that you generate in the regular course of business?

A. It's very typical.

Q. And this is a true and correct copy of that administrative request form in this case?

A. Yes.

MR. LAUTEN: Offer 54A, Your Honor.

MR. GIBSON: Objection to its relevance, Your Honor.

THE COURT: Overruled. 54A of the plaintiff's exhibits is admitted.

(Plaintiff's Exhibit 54A admitted into evidence.)

* * *

[169]

CROSS-EXAMINATION

BY MR. GIBSON:

* * *

[172]

Q. Ms. Moreno, you work for Parkland, correct?

A. Yes, that's correct.

Q. You do not work for UT Southwestern.

A. No.

Q. You report to employees of Parkland, correct?

A. Yes.

Q. You do not report to UT Southwestern, correct?

A. Correct.

Q. Your supervisors are Parkland employees, correct?

A. Yes.

Q. You've never been supervised by Dr. Fitz or Dr. Levine, have you?

A. No.

Q. And you're not an authority on any agreements between Parkland or UT Southwestern, are you?

A. No.

Q. You're not an authority on the affiliation agreement that governs hiring of physicians at Parkland facilities covered by that agreement, are you?

A. No.

Q. You're aware, and I think you testified, that Dr. Nassar was trying to come to work at Parkland many months prior to July 2003, correct?

A. We discussed it several times.

Q. And in fact, you discussed it as early as April of 2006, correct?

A. I don't recall the dates.

Q. There's a blue binder in front of you.

MR. GIBSON: May I approach, Your Honor?

THE COURT: You may.

MR. GIBSON: It's one I am going to call defendants' exhibits, and I am going to be asking you to flip to certain exhibits.

If you could flip to Defendants' Exhibit — actually, Plaintiff's Exhibit Number 19, please.

THE COURT: It's in.

MR. GIBSON: Yes.

THE COURT: Just so we know that.

Q. (By Mr. Gibson) Do you see this e-mail?

A. Yes.

MR. GIBSON: If you will give me just a moment, I would like to publish it to the jury if I may, Your Honor.

Q. (By Mr. Gibson) You're a recipient of the e-mail, the first e-mail on the e-mail chain, correct?

A. Yes.

Q. And this is an e-mail from Dr. Ross to you and Dr. Nassar, correct?

A. Yes.

Q. And this is dated April 17th, 2006, correct?

A. Yes, it is.

Q. And Dr. Ross tells you in April: I talked to him about you becoming a Parkland employee, and he does not support the idea; isn't that correct? Did I read that correctly?

A. Yes, that's what's in the e-mail.

Q. And your understanding is that Dr. Ross is saying essentially, I talked to Dr. Fitz about you, Dr. Nassar, becoming a Parkland employee, and he does not support the idea, correct?

A. I'm sorry. Dr. Fitz is on this e-mail?

Q. No, he's not. I want to make clear that you understand that Dr. Ross is referring to Dr. Fitz here when he says, I talked to him.

A. Oh, okay.

THE COURT: You mean Dr. Fitz?

MR. GIBSON: What?

THE COURT: Him, being Dr. Fitz?

Q. (By Mr. Gibson) Yes, him being Dr. Fitz. That's your understanding, correct?

A. Yes.

Q. So the e-mail replacing the pronouns would read: Yes, I talked to Dr. Fitz about Dr. Nassar becoming a

Parkland employee, and Dr. Fitz does not support the idea.

That's your understanding of that e-mail.

A. Yes.

Q. So you were aware as early as April 17th that Dr. Fitz did not support the idea of Dr. Nassar being employed by Parkland; isn't that true?

A. According to this e-mail, yes.

Q. And you don't dispute that you received this e-mail, correct?

A. I don't dispute it, but there were several conversations after this e-mail.

Q. And there were conversations clearly prior to this e-mail?

A. Yes.

Q. So clearly prior to this e-mail, Dr. Nassar was considering becoming a Parkland employee, and Dr. Fitz had already expressed his objection to that idea.

A. Yes.

Q. And conversations regarding Dr. Nassar coming to Parkland continued, didn't they?

A. Yes.

Q. And in fact, you were aware that Dr. Fitz continued to express the same objection to Dr. Nassar going to Parkland as early as April 2006, correct?

A. Yes.

Q. And you were aware, in fact, that Dr. Fitz stated that the basis of his objection is that it would have violated the agreement between Parkland and UT Southwestern, correct?

A. Yes.

Q. And you're aware that this agreement exists, right?

A. I have never seen this agreement.

Q. You are aware that there's an agreement between Parkland and UT Southwestern, but you're not familiar with it, correct?

THE COURT: I think that's fine. Overrule the objection.

A. I've never seen this agreement.

Q. (By Mr. Gibson) But you were aware that that was the basis of Dr. Fitz's objection in April, weren't you?

A. I'm aware that many times administrative staff at Parkland reference something they call the right of first refusal for the medical school that usually impacts Parkland in one way or the other.

Q. And you were aware that Dr. Fitz was citing to the agreement between UT Southwestern and Parkland for the basis of the objection of Dr. Nassar going to work at Parkland as early as April.

MR. LAUTEN: Objection, asked and answered and no foundation.

THE COURT: Overruled. One more time, if you will.

MR. GIBSON: May I approach the witness, Your Honor?

THE COURT: Yes. Ms. Davis, if you need to stand up, I told you you have my permission. Do you need a short break?

JUROR DAVIS: Yes.

THE COURT: Let's take a five-minute break. We will take our longer break closer to three. And any time you need to stand up or need a break, as I said that's fine.

(Jury leaves courtroom)

THE COURT: Is there something that we need to take up? I think what was said sidebar was this 54B has writing on it that is clearly agreed to be Mr. Lauten's. So he took it off, appropriately so, but you thought it looked like — it wasn't what you expected, so we're going to look and see if we can find an unredacted version of this that doesn't look redacted.

MR. GIBSON: That's correct.

THE COURT: Is there anything else on that we need to talk about?

MR. GIBSON: One other minor housekeeping matter. There were two documents that I introduced as exhibits, I think it's 76 and 77, I think Dr. Keiser's. I had hand-marked those exhibits. We have proper exhibit markings for the Court, and we are happy to properly mark those exhibits.

THE COURT: That's fine. If you have them, make sure we get them. And make sure as we finish each day that all of the exhibits on the witness stand and

anything that's been published to the jury is back in our hands. All right? We will give you a couple more minutes.

(Recess taken from 2:32 to 2:38.)

THE COURT: Ms. Moreno, you can come back up here.

(Jury enters courtroom)

THE COURT: Please be seated.

Q. (By Mr. Gibson) We were speaking about Dr. Nassar's attempts to come to work at Parkland back in April of 2006, correct?

A. Correct.

Q. Those efforts continued through May and June, correct?

A. Yes.

Q. And numerous people at Parkland were working to hire Dr. Nassar, correct?

A. Yes.

Q. If you could turn in that large binder to 50A, the tab behind 50. And in fact, you personally were involved in salary negotiations with Dr. Nassar in May of 2006, correct?

A. Yes.

Q. And you were negotiating salary with Dr. Nassar knowing that Dr. Fitz had objected to Dr. Nassar going to work at Parkland based on the affiliation agreement.

MR. LAUTEN: Objection, Your Honor, mischaracterizes the testimony; no foundation.

THE COURT: Overruled. You can take that up on redirect.

A. I do not negotiate salary. It's the responsibility of Medical Staff Services to negotiate salary.

Q. (By Mr. Gibson) I apologize, Ms. Moreno. My understanding was you just previously testified that you were involved in salary negotiations with Dr. Nassar in May of 2006 as reflected in this e-mail; is that correct?

A. Yes; Medical Staff Services will ask my advice.

Q. And as I said, you, along with other people at Parkland, were involved in negotiating Dr. Nassar's salary in May of 2006, correct?

A. Yes.

Q. And this was after you had been informed in April that Dr. Fitz was objecting to Dr. Nassar going to work at Parkland, correct?

A. Yes.

Q. So you knew when you wrote this e-mail — I'm sorry, when you received this e-mail and when you were engaged in the negotiations of Dr. Nassar's salary, that UT Southwestern was objecting to this hire, correct?

A. Yes.

Q. And it looks as if Parkland was considering offering Dr. Nassar approximately $183,000 to go work at Parkland; is that right?

A. Yes.

Q. Because that's what Dr. Nassar was asking for, correct?

A. I don't recall the salary he was asking for.

Q. Does reading this e-mail refresh your recollection where it says, quote, he's asking for $87.93 an hour, which equates to, I would say, approximately $183,000?

A. Yes, I see that; yes.

Q. That refreshes your recollection, that Dr. Nassar was requesting $183,000?

A. Yes.

Q. Do you know if that was more than he was making at UT Southwestern?

A. I don't recall his salary at UT Southwestern.

Q. You later confirmed, didn't you, that Parkland could afford the $183,000 salary, didn't you?

A. The vice president signed off on the salary.

Q. Just to be clear — may I approach the witness, Your Honor?

THE COURT: You may.

Q. (By Mr. Gibson) Do you see this document, ma'am?

A. Yes, I see it.

Q. And that document, does that refresh your recollection as to whether or not you reviewed the budget and determined that Parkland could meet Dr. Nassar's requested salary?

A. Yes, I reviewed the budget.

Q. And based on your review, Parkland could meet the requested salary?

A. There were sufficient funds to support the salary.

Q. Thank you. And this was, again, in early June, after you were aware of Dr. Fitz's position to hiring Dr. Nassar?

A. Yes.

Q. And you were involved in these salary discussions with other Parkland staff, including Denise Morgan and Randy Blanchard, correct?

A. Yes.

Q. Those were not UT Southwestern employees, were they?

A. No.

Q. And in fact, you previously mentioned the — and I'm going to get this wrong — the Staff Services Department, Medical Staff Services?

A. Yes, sir.

Q. Denise Morgan was from the Medical Staff Services, correct?

A. Yes.

Q. And that's the department that manages the hiring process for physicians; isn't that correct?

A. Correct.

Q. Physicians at Parkland.

A. Yes.

Q. Hiring of physicians at Parkland.

A. Yes.

Q. And you did not have authority to hire physicians at Parkland, did you?

A. That's correct.

Q. And you were not a member of the Medical Staff Services department that managed the hiring of physicians, were you?

A. Correct.

Q. And to your knowledge, no UT Southwestern employees were involved in the salary negotiations other than Dr. Nassar himself, correct?

A. Correct.

MR GIBSON: I would like to publish 52A, which has been admitted into evidence, Your Honor.

THE COURT: You may.

Q. (By Mr. Gibson) So those salary discussions with Dr. Nassar continued in June after Dr. Fitz had already made his objection, correct?

A. Correct.

Q. And on July 3rd, you received an e-mail or you — apologize. On July 1st, you write to Denise Morgan in the Medical Staff Services department, did we get the letter out to Dr. Nassar, correct?

A. Yes.

Q. And when you wrote that, you were aware that Dr. Fitz had objected to this hiring back in April, correct?

A. Correct.

Q. And then you say: If we cannot get in to start July 10th, we are going to have critical staffing issues.

My understanding is Dr. Nassar was already at that time on staff at Amelia Court Clinic as a UT Southwestern faculty member, correct?

A. Correct.

Q. So there was no urgency to get him started at the same job just being paid by Amelia Court — or by Parkland at any particular date, was there? Absent his resignation — maybe I should say this a better way: Absent his resignation, there was no urgency to transfer him from a UT Southwestern employee to a Parkland employee, was there?

A. There was urgency.

Q. There was urgency to transfer someone who was seeing patients, seeing the most patients in the clinic already as a UT Southwestern employee, to just merely transfer over his employer to Parkland where he would continue doing the same thing, seeing patients in Amelia Court Clinic; you're telling us there was urgency for that?

A. I knew that his relationship with UT Southwestern was contentious.

Q. And so you were —

MR. LAUTEN: Your Honor —

MR. GIBSON: I apologize.

THE COURT: Go ahead and finish, Ms. Moreno.

A. And I knew from conversations with Dr. Nassar and Dr. Keiser that he was considering leaving the area.

Q. (By Mr. Gibson) So your statement that — strike that. You knew from conversations with Dr. Keiser and Dr. Nassar that he was considering leaving the area.

A. Yes.

Q. And would that mean he was considering moving to California?

A. I don't know.

Q. You knew he was considering leaving the area as soon as July 1st, 2006?

A. I didn't have a date. I was concerned that he may get up and leave and we wouldn't have coverage for our patients.

Q. So as I understand your testimony, when you wrote this e-mail that, if we cannot get him to start July 10th, we're going to have critical staffing issues.

When you wrote that e-mail, you were concerned about staffing issues in the event that Dr. Nassar resigned and left the area.

A. Yes.

Q. It wasn't that you had critical staffing issues with Dr. Nassar already working there, it was the staffing issue that would occur if he left, correct?

A. Correct.

Q. On the same day as the offer letter, the draft offer letter that was put up before the jury, the same day that's dated, Denise Morgan writes back, it's July 3rd: We are planning for everything to be in place this date, referring to July 10th. And then she refers to, Dr. Ross will be here on Wednesday and can sign the offer letter, correct? Did I read that correctly?

A. Yes.

Q. She also states: However, I still need Dr. Nassar to complete the employment paperwork and go through occupational health, drug screening, Group One, et cetera, correct?

A. Correct.

Q. It's going to be a push, however we can possibly make it work, correct?

A. Correct.

Q. So as of July 3rd, Parkland was pushing to hire Dr. Nassar, correct?

A. Yes.

Q. Knowing already that Dr. Fitz had objected to this in April of 2006, correct?

A. I would not continue to attempt to bring Dr. Nassar on board without approval and full knowledge of Parkland administration.

Q. So you knew that you had to run this by Dr. Ross, correct?

A. Yes.

Q. Approximately within two days of your initial e-mail, someone creates a draft offer letter to Dr. Nassar dated July 3rd, correct?

A. Correct.

Q. And you don't recall who prepared that document, do you?

A. I do not know who prepared the document. It's a standard document.

Q. And just to be clear, you don't know who prepared the draft offer letter that we looked at earlier, do you?

A. No.

Q. And that's not a final draft, is it, because it's not signed by Dr. Nassar.

A. I don't know that Dr. Nassar ever received that letter.

Q. I apologize if I misspoke. You stated earlier that this is not a final draft, that draft offer letter, because it's not signed by Dr. Ross, correct?

A. That's correct, but these letters are not usually signed.

Q. They are not usually signed. Do you recall giving a deposition in this case previously?

A. Yes.

Q. And when you were deposed, you answered those questions truthfully; is that correct?

A. Yes.

Q. And your deposition was closer in time to the relevant events than we are today.

A. Less than a year.

Q. I'm sorry?

A. The deposition was, yes, less than a year from now.

Q. It was closer to 2006 than we are now.

A. Yes.

Q. In your — and you're saying that the final — the draft offer letter for Dr. Nassar was not signed by Dr. Ross, correct?

A. The letter I reviewed was not signed by him.

Q. That means — I apologize. That means it's a not final draft, correct?

A. All I know is that he didn't sign it.

Q. And that means it's not a final draft, correct?

A. All I know is that he didn't sign it.

Q. There is a binder in front of you.

MR. GIBSON: May I approach, Your Honor?

THE COURT: You may.

Q. (By Mr. Gibson) This is the previous deposition testimony, and it should be of Sylvia Moreno. I will refer to the page and line numbers.

A. Okay.

Q. If you could turn to page 14, line 20, please. Let me help you.

A. Okay.

Q. In that — starting actually at line 16, you were asked about this letter: When do you remember seeing it? Was it e-mailed to you? Was it dropped off in an outbox? Was it hand-delivered to you? I mean, how did you get it?

You answered: I do not recall.

Question: Is that a final draft?

Answer: Since it is not signed, I would say no.

Is that what you testified to previously?

A. Yes, it is.

Q. And you testified truthfully when you testified to that answer?

A. Yes, I did.

Q. You previously testified that it was your understanding that Parkland didn't need to do anything else except sign this letter prior to offering Dr. Nassar a job; isn't that correct?

A. That's correct.

Q. According to this e-mail from Ms. Morgan, Dr. Nassar still needed to complete the employment paperwork and go through occupational health drug screening, Group One, et cetera; isn't that correct?

A. Correct. I mentioned that earlier, that that still needed to be done before he could come into the first orientation day.

Q. None of that was done, correct?

A. I don't know.

Q. It is possible Dr. Nassar may not have passed those steps, correct?

MR. LAUTEN: Objection, calls for speculation.

THE COURT: If you can answer without guessing; otherwise, please don't answer.

A. I don't know if Dr. Nassar went to occupational health.

Q. (By Mr. Gibson) And you don't know if he did his drug screening?

A. I don't know.

Q. Or whether he passed his drug screening?

A. I don't know.

MR. LAUTEN: Objection, Your Honor, argumentative.

THE COURT: Sustained. Let's move ahead from this. We have covered this.

Q. (By Mr. Gibson) Just to be clear, you didn't have the authority to offer Dr. Nassar — offer Dr. Nassar a job with Parkland, did you?

A. No, I did not have the authority.

Q. You previously testified that on July 4th you signed the administrative exception request form seeking approval to offer Dr. Nassar approximately $183,000 in salary, correct?

A. Yes.

Q. And you also signed the HR action form regarding Dr. Nassar and that you had done the

departmental interview covering service excellent guidelines and other administrative matters, correct?

A. Yes.

Q. And you did all of this knowing that you did not have the authority to hire Dr. Nassar, correct?

A. I knowingly did it because I had the support of Parkland administration.

Q. I think you previously testified that you had to speak with Dr. Ross —

A. Yes.

Q. — correct? You did not have the support of Dr. Ross to offer Dr. Nassar a job offer, did you?

A. Dr. Ross never told me that he would not pursue.

Q. Just to be clear, you were never given authority from Dr. Ross to make a job offer to Dr. Nassar, were you?

A. I was told that this was appropriate by the vice president at the time who signed off on the paperwork and the administrative exception.

Q. Just to be clear, you were never told by Dr. Ross that you had authority to make any job offer to Dr. Nassar, were you?

A. Dr. Nassar —

Q. Can you please answer the question I have asked you a couple of times? I don't want to interrupt you. It's a simple question and requires a yes-or-no answer.

A. Dr. Ross was involved in the discussions with Medical Staff Services regarding the offer of this job.

Q. And yet, again, I am going to ask the same yes-or-no question.

THE COURT: If she can answer it yes or no.

Q. (By Mr. Gibson) Can you answer this question, very simple: You were never given authority from Dr. Ross to make the job offer to Dr. Nassar, were you?

A. Yes.

Q. Didn't you just state that you needed Dr. Ross' signature on the offer letter?

A. Dr. Ross kept telling me he was continuing to attempt to get approval, a blessing from Dr. Fitz to have Dr. Nassar come on board at Parkland Hospital.

Q. And you knew that that had been — that had already been stated, the objection back in April, correct?

A. Yes.

Q. And if you needed that approval and you knew you didn't have it, did you have authority to make a formal job offer to Dr. Nassar? I think you previously stated that personally —

THE COURT: Questions, questions, not a speech. Ask a question, please.

Q. (By Mr. Gibson) I think you previously stated that you don't have authority to make job offers, correct?

A. No, I did not officially have authority.

Q. When did you find out that Dr. Ross was moving to California?

A. Dr. Nassar sent an e-mail that I saw in the deposition.

Q. Do you recall — I'm sorry, I didn't mean to interrupt you.

A. He informed me in the e-mail that he was moving on.

Q. And you recall that being approximately July 10th, 2006?

A. I don't recall the date.

Q. You wouldn't dispute that fact, correct?

A. I don't recall the date.

Q. Do you recall Dr. Nassar telling you that one of the reasons he was resigning was family related?

A. I don't recall that.

* * *

[205]

J. GREGORY FITZ, M.D.,

having been previously sworn, testified as follows:

DIRECT EXAMINATION

BY MS. ALDOUS:

* * *

[209]

Q. All right. Now, when you started first hearing about Dr. Nassar possibly going to work for Parkland, you started talking to Dr. Sam Ross, the

gentleman whose deposition we saw earlier, did you not?

A. I think I only heard about this really once in a conversation with Dr. Nassar.

Q. Now, are you telling the jury that you did or did not have conversations with Dr. Ross, the chief medical officer at Parkland in April of 2006 about the possibility of Dr. Nassar working for Parkland?

A. Yes.

Q. Okay.

A. One, as I recall.

Q. All right. Actually, you started having conversations with Dr. Ross in around April of 2006, and those discussions continued through the summer of 2006, did they not?

A. The point in question in my mind I thought was settled in April.

Q. Okay. That wasn't quite my question.

A I'm sorry.

Q. Would you agree with me that you first started having discussions with Dr. Ross about Dr. Nassar going to work as an employee at Parkland in April of 2006, and those discussions continued through the summer of 2006?

A. I disagree.

Q. Okay.

MS. ALDOUS: May I approach, Your Honor?

THE COURT: You may.

Q. (By Ms. Aldous) You recall giving an affidavit in this case, do you not, sir?

A. Yes, ma'am.

Q. And let me just show you my copy. Do you see paragraph 6 of your affidavit?

A. Yes, ma'am.

Q. And you say: This issue was addressed in a forthright matter with Dr. Sam Ross of Parkland Hospital, as well as to Dr. Nassar in April of 2006.

Do you see that?

A. Yes, ma'am.

Q. And then do you go on to say at the bottom here: My discussions with Dr. Ross continued into the summer of 2006, after Dr. Nassar submitted his resignation letter?

A. Yes, ma'am.

Q. So that's, in fact, what happened. You knew around April of 2006 that Dr. Nassar was considering going to work for Parkland; you had ongoing discussions with Dr. Ross about that; and, as your affidavit said, those discussions continued into the summer of 2006. Correct?

THE COURT: You have to say yes or no.

A. Oh, yes.

Q. (By Ms. Aldous) If you need some water, there's that jug right there by you.

A. Thank you.

Q. All right. So it was no secret to you from the summer — from the spring until the summer of 2006 that Dr. Nassar, in fact, wanted to continue working at Amelia Court and wanted to work for Parkland, being an employee of Parkland, correct?

A. I think Dr. Nassar and I spoke really about it on the one occasion.

Q. I didn't ask about speaking to Dr. Nassar. My question is: You had an understanding from April of 2006 through the summer of 2006 that there were continued discussions about Dr. Nassar going to work for Parkland and handling the Amelia Court Clinic, did you not?

A. No, ma'am. I'm sorry if I'm being nonresponsive. Please go ahead.

Q. So you did not have discussions from April of 2006 until the summer?

A. Well, I did in April, and then there was a long period when there were no discussions. And then in July or thereabouts, you know, after the resignation, yes.

Q. Okay. Let me ask you this before we start discussing the master affiliation. You would agree with me, Dr. Fitz, that no employee, whether they be an employee of UT Southwestern, an employee of Parkland, or an employee of any corporation in the United States, should be subjected to harassment or discrimination based upon their ethnicity, their religion?

A. Yes, ma'am.

Q. No question about that.

A. No, ma'am.

Q. And you knew early on, in the year of 2006, that there were some issues between Dr. Beth Levine and Dr. Nassar, did you not?

A. Yes, ma'am.

Q. And you knew that there were some disagreements from Dr. Levine about things that she thought Dr. Nassar was or was not doing in his professional role as a faculty member at UT Southwestern, did you not?

A. She actually was a sponsor, a supporter, and she was asking questions as part of this promotion process that's been referred to earlier. They were not — they were asked in a manner to help get him promoted, not to prevent it.

Q. Okay. So you are telling the jury that you believe Dr. Levine was a sponsor of Dr. Nassar and was trying to help him get promoted?

A. Yes, ma'am.

Q. Well, let me ask you this: You would certainly expect Dr. Levine, if she is Dr. Nassar's supervisor, to understand the way that Dr. Nassar was being paid, for instance, through the Ryan White fund, would you not?

A. Not necessarily.

Q. Well, do you understand that Dr. Nassar at one point in time was receiving 100 percent of his compensation through the Ryan White fund?

A. He approached me with this information in, I believe, April and we discussed it.

Q. So you knew at some point in time that Dr. Nassar's salary was 100 percent being paid by the Ryan White fund, correct?

A. Yes, Dr. Nassar told me.

Q. And you can't tell the jury, as we sit here today, whether Dr. Levine had that knowledge or not?

A. I do not know.

Q. If she did have that knowledge, you would certainly agree with me that it would be inappropriate for Dr. Levine to be concerned about how much Dr. Nassar was billing for seeing patients; that wouldn't make sense, would it?

A. No, I disagree with you.

Q. Would you agree with me, if Dr. Nassar is being paid 100 percent by the Ryan White Grant or Fund, that he cannot be billing for inpatient services at the Amelia Court Clinic?

A. I disagree with you.

Q. You think he can?

A. Yes, ma'am.

Q. So it's your testimony here today that you believe Dr. Nassar, if 100 percent of his salary is coming from that federal grant, that you can still turn around and bill for inpatient services and basically double dip?

A. That would be my understanding.

Q. Is that a common practice at UT Southwestern, sir?

A. No, ma'am. The Ryan White fund is a very specific entity that's designed — I'm not an expert, but it's designed to make sure people with no money can go get good medical care. And so my understanding of it is that if one is supported through Ryan White funds, it's not only good practicing to bill for those other patients that can pay, it's required, because that ends up having more resources for other activities. And Dr. Nassar did discuss this with me, and this is the first time I had encountered it.

Q. Let me ask you this: You're absolutely sure that an employee such as Dr. Nassar, who is being paid 100 percent of his salary by the Ryan White fund, can also turn around and bill Medicare or Medicaid for patient services? That's what you believe is appropriate?

A. Number one, I'm certainly not an expert; and number two, yes, ma'am; and number three, when it was brought up by Dr. Nassar, we made accommodations because I didn't really know.

Q. Well, actually what Dr. Nassar told you, Dr. Fitz, is he was uncomfortable with UT Southwestern having him bill —

THE COURT: Excuse me one moment.

Mr. Hagen?

MR. HAGEN: Objection, it's facts not in evidence.

THE COURT: You need to rephrase the question. I agree, as phrased, yes, it is.

Q. (By Ms. Aldous) Dr. Fitz, you did have a discussion with Dr. Nassar in 2006 about him

wanting to change it where 100 percent of his salary did not come from the Ryan White fund because he was uncomfortable with the billing practices at UT Southwestern. Do you recall that conversation?

A. Yes, ma'am.

Q. And he was telling you, UT Southwestern is wanting me to bill for services, and I think that's a direct violation of —

MR. HAGEN: Your Honor, objection.

THE COURT: Sustained. Sustained. Not in evidence.

Q. (By Ms. Aldous) Let me ask you this, Doctor: Would you agree with me that it would be inappropriate for a facility such as UT Southwestern to ask a physician to bill if that physician thought it was inappropriate?

A. Yes. I don't think any physician should be doing something that they felt was inappropriate.

Q. Now let's go to what I have in front of you, Defendants' Exhibit Number 15.

A. This one?

Q. Yes. First of all, you recall when Dr. Keiser was in here testifying — and you have known Dr. Keiser for quite a while, have you not?

A. Yes, ma'am.

Q. And you heard the things that Dr. Keiser said about your conversation with him concerning Dr. Nassar, did you not?

A. Yes, ma'am.

Q. And you are telling this jury that your decision to not allow Dr. Nassar to be an employee of Parkland had nothing to do with his discrimination claim by the EEOC.

A. Yes, ma'am.

Q. That was absolutely two separate things not related at all.

A. Yes.

Q. That's your testimony.

A. That's correct.

Q. And it is also your testimony that Dr. Nassar could not be employed by Parkland because that would violate the master services agreement, correct?

A. Yes, ma'am.

Q. Well, the truth of the matter is, Dr. Fitz, that what you did in blocking Dr. Nassar's appointment to Parkland was to support your friend Dr. Levine because she had been publicly embarrassed by Dr. Nassar's filing the discrimination claim. That's the truth, is it not?

A. No, ma'am.

Q. Well, was Dr. Levine, by the way, on a committee that allowed you to be promoted to dean of the medical school?

A. I do not know.

Q. You don't recall?

A. I just don't know.

Q. Was her husband, Dr. Packer, on that committee?

A. They are both prominent physicians. It would not be a surprise to me if they were on it.

Q. Okay. Now, you did know prior to Dr. Nassar resigning that he had made allegations that Dr. Levine had been discriminating against him; you were aware of that, were you not?

A. I'm not sure when I became aware of that. The first time I really became aware of it was with his letter of resignation.

Q. You did know there were discussions about the relationship between Dr. Nassar and Dr. Levine prior to Dr. Nassar resigning.

A. I know of one occasion.

Q. Because that would be something that would be in your purview as Dr. Levine's superior during that time, correct?

A. Yes, I can think of one occasion.

Q. Now, you did receive the letter from Dr. Nassar on July 3rd, 2006, which is Plaintiff's Exhibit Number 15, wherein he told you he was resigning effective September 1st, 2006, correct?

MS. ALDOUS: May I approach, Your Honor?

THE COURT: You may.

A. I did receive this letter. My memory is that it came in July 7th, dated July 3rd, but I'm not sure.

Q. (By Ms. Aldous) When you received this letter, it was quite obvious to you that Dr. Nassar had several

issues with Dr. Levine and, in fact, had thought that he had been discriminated against by her as his supervisor at UT Southwestern, correct?

A. Yes, ma'am, it was clear he felt that way.

Q. And during this time, on July 3rd or July 7th, 2006, when you received this letter from Dr. Nassar, you knew that Dr. Nassar was clinical faculty at UT Southwestern, did you not?

A. Yes, ma'am.

Q. And he was also practicing at Parkland Hospital, was he not?

A. Yes.

Q. And you heard Dr. Ross testify that in order to practice at Parkland he believed you had to be a clinical faculty member at UT Southwestern, correct?

A. Yes.

Q. And now you're not telling the jury, are you, Dr. Fitz, that every single doctor that practices at Parkland is an employee of UT Southwestern, are you?

A. No.

Q. There are many doctors that are hired by Parkland who are not faculty members at UT Southwestern, correct?

A. Yes, ma'am, particularly in the COPCs, those clinics that are geographically separated away.

Q. And in the Amelia Court Clinic?

A. Actually, not to my knowledge.

Q. Is Dr. Akbar a clinical faculty member at UT Southwestern?

A. I believe he works for the COPCs, and he does come to Amelia Court, and that's a very good thing. We like to have COPC doctors come in for training, exposure, education.

Q. My question is, is Dr. Akbar a clinical faculty member at UT Southwestern?

A. I do not know.

Q. So there are doctors that practice at Amelia Court who are not faculty members at UT Southwestern and that's been consistent for years, correct?

A. Actually, I do not know that.

Q. You don't know one way or the other?

A. No, ma'am.

Q. I thought you said that Dr. Nassar couldn't practice as an employee of Parkland unless he was a clinical faculty member because it wasn't allowed. Do you know that, or do you not, sir?

A. There are two geographies to my knowledge, again, governed by this affiliation agreement. And the heart of it is that the doctors at Parkland within that geography are faculty members, and we have hundreds of doctors there. It's just not an Amelia Court issue, it's surgery and cardiology and everything else. And so we have many volunteers that come in and work as well. But then doctors that are not primarily there we have no real dominion. Parkland can hire those doctors.

Q. Would you agree with me that Parkland has the ability to hire doctors to work at their clinics, including the Amelia Court Clinic, without that doctor being a faculty member at UT Southwestern?

A. No, ma'am.

Q. You disagree with that?

A. Yes, ma'am.

Q. Even though Dr. Akbar could possibly be one of those people?

A. I don't have any direct knowledge.

Q. Do you know or do you not know?

A. I know that the affiliation agreement says that should not take place. Parkland could hire doctors to work elsewhere but not within the confines of the school without knowledge and . . .

Q. Well, actually the affiliation agreement is providing that UT Southwestern provide services to the patients at Parkland, correct?

A. Yes, ma'am.

Q. And in fact, the citizens of Dallas County pay UT Southwestern a lot of money every year to help pay them for treating patients at Parkland Hospital, do they not?

A. Yes, ma'am.

Q. And I think to the tune of $100 million a year?

A. Yes, ma'am.

Q. And that's because Parkland needs the doctors at UT Southwestern, correct?

A. Yes, ma'am, and we need Parkland.

Q. But it certainly doesn't prohibit Parkland from hiring physicians or employees that they think are needed in order to safely and accurately and effectively treat their patients, correct?

A. They certainly can with no involvement of the school hire people to work at the COPCs. My understanding is that should they want to hire somebody to work within the confines of Amelia Court and the rest of the hospital, yes, they do.

Q. Is that your understanding, or do you know it for a fact, sir?

A. That's my understanding.

Q. Have you inquired? Have you asked people at UT Southwestern, hey, would it be okay if Dr. Nassar went to work as an employee at Parkland?

A. The — it's my understanding, based on the reading of this affiliation agreement — and I do remember it pretty well, it's a singular event, and in my many, many years there I was never approached from Parkland to see if this would be permissible. That's why I do remember it.

Q. So you remember it because this is the only time Parkland had ever approached you asking if they could hire an employee of UT Southwestern to work for Parkland?

A. Actually, Parkland didn't, Dr. Nassar did.

Q. Let me ask you this, then. You read the master services agreement and the affiliation agreement and, based upon your reading, you made the

determination that Dr. Nassar actually could not go to work for Parkland. Is that what you are telling the jury?

A. Yes, and other discussions.

Q. All right. Well, I would like for you to look — and I think in your affidavit you attached Exhibit Number 15, Defense Exhibit Number 15, and said, this is one of the documents that you relied on in making the decision that Dr. Nassar could not go to work as an employee of Parkland. Could you point to the page or the line or the sentence or the paragraph, Dr. Fitz, where it states that in Exhibit Number 15 which you relied on in blocking Dr. Nassar's employment at Parkland?

A. I'm sorry, I'm looking at all of the whereases.

Q. And take your time. You attached this to your affidavit and you said this document is one of the reasons you did not allow Dr. Nassar to go to work at Parkland, correct.

A. Yes, ma'am.

Q. So if you can tell the jury where it says that in Defense Exhibit Number 15.

A. It's really in Section 4. And in this case it says, the responsibilities of the regents, our governing body from the University of Texas, shall be, 4a is governance and management of center pursuant to the laws of the State of Texas, including budgetary and fiscal matters, appointment of administrative officers and faculty of center, supplying of sufficient number of qualified physicians who are members of center faculty to adequately provide direct and

supervised physician medical services to all inpatients and outpatients of Parkland Memorial Hospital and other district healthcare facilities.

Q. And you think that paragraph tells you, Dr. Fitz, that Dr. Nassar —

THE COURT: Excuse me. Excuse me.

MR. HAGEN: Objection. I believe he was reading.

MS. ALDOUS: I'm sorry, I thought he was finished.

MR. HAGEN: Were you concluded?

THE WITNESS: Well, there's more.

THE COURT: I'm not sure that that was responsive to the question. I just couldn't tell from that, so let's start with another question.

Q. (By Ms. Aldous) Are you telling the jury that what you just read in Defense Exhibit Number 15 made you believe that Dr. Nassar could not be an employee at Parkland Hospital in the Amelia Court facility?

A. That is the heart of it, yes.

Q. That, what you just said?

A. Yes, ma'am.

Q. All right. Now, let me hand you if I could, Exhibit Number — if I can find it here.

MS. ALDOUS: May I approach, Your Honor?

THE COURT: You may.

Q. (By Ms. Aldous) Defense Exhibit Number 16. And as I understand it, Dr. Fitz, this is also another part of the master affiliation agreement that you

believe supported your decision to block Dr. Nassar's employment at Parkland, is it not?

A. No, ma'am. This was dated after any such decision.

Q. Okay. That was going to be my question, because this actually was dated in September of 2006, I believe, if my memory serves me correctly, and so it could not apply to your decision to stop Dr. Nassar's employment at Parkland, correct —

MR. HAGEN: Objection —

Q. — because it wasn't —

MR. HAGEN: — it misstates what Rule 16 says.

THE COURT: Overruled. We don't need a speech.

MR. HAGEN: It was in June of 2000.

THE COURT: That's exactly my point. I've talked to both sides about this. Legal objection; I don't need a speech.

Q. (By Ms. Aldous) And I did misspeak, it's June of 2006, correct?

A. Yes, ma'am.

Q. That's when the master affiliation agreement is made and entered, this 29th day of June 2006. Do you see that?

A. Yes, ma'am.

Q. Okay. But if you turn to page 4 of this exhibit under the term and termination, do you see the initial term of this agreement is for a ten-year period beginning September the 1st, 2006?

A. Um-hum.

Q. Is that correct?

A. Yes, ma'am.

Q. So this agreement, although it's dated June 29th, 2006, the document itself says it's not in force and effect until September of 2006, correct?

A. Yes, ma'am, that's what it says. But I have no direct — I have no part in making this.

Q. I understand that. But that's what the document itself says?

A. Yes, ma'am.

Q. And you've attached this document to your affidavit. You say this is one of the reasons that I could not allow Dr. Nassar to be a — an employee at Parkland because this agreement prevented it, didn't you?

A. I was — yes.

Q. And that's impossible. This agreement could not have prevented you from allowing Dr. Nassar to be an employee at Parkland because the agreement wasn't even in effect when Dr. Nassar left Dallas, correct?

A. Yes, ma'am, but the 1979 agreement was.

Q. The Exhibit Number 15 that we just looked at?

A. Yes, ma'am.

Q. Now, you would agree with me, I bet, Dr. Fitz, that you should never — even if an agreement states something, it is not acceptable to violate a person's rights in violation of a law.

A. I certainly do agree.

Q. Because no matter what the master affiliation agreement says, it would be wrong for you to use that agreement to support your colleague, Dr. Levine, in her fight with Dr. Nassar, correct?

A. That would be wrong if that was the case.

Q. Okay. For instance, if, in fact, Dr. Levine was harassing Dr. Nassar and if it was causing Dr. Nassar to work in an unacceptable environment, and if because of that Dr. Nassar wanted to resign UT Southwestern, keep treating his patients, and work as an employee at Parkland so he could get away from that harassment, if, in fact, that were true, and if, in fact, you tried to use this master services agreement or Exhibit Number 15 to block Dr. Nassar from working for Parkland in an effort to support Dr. Levine, that would be absolutely wrong, would it not, sir?

A. If that were true, that would be wrong.

Q. And in fact, would you agree that — you've seen, I assume — may I approach, Your Honor?

THE COURT: You may.

Q. Defendants' Exhibit Number 75. Have you seen this before?

MR. HAGEN: Your Honor, may we approach?

THE COURT: All right. Just one moment, Doctor, if you will hang on there. That's defense 75, which is preadmitted.

(Discussion held at the bench off the record.)

Q. (By Ms. Aldous) Do you see Defense Exhibit 75 there, sir?

A. Yes, ma'am.

Q. And this is actually a memorandum of a telephone conversation between an EEOC investigator, Dawn Lewis, dated March 22nd, 2008. Do you see that?

A. Yes, ma'am.

Q. And the charging party, that is the person bringing the EEOC complaint, it says is Dr. Nassar. Do you see that, sir?

A. Yes, ma'am.

Q. And I want to see if you agree or disagree with the statements in Defendants' Exhibit Number 75: Ms. Lewis says in her conversation with Tisa Jordan — and Tisa Jordan is an employee at Parkland. You understand that, do you not?

A. No, I have no knowledge.

Q. All right. You have no reason to doubt that?

A. I trust you, yes.

Q. All right. I called to conduct PDI with Tisa Jordan, Employee Relations Specialist II for Parkland. I explained to Ms. Jordan that the commission made a determination in the Nassar charge. I reviewed CPs — and CPs is the charging party, so I'm going to say Dr. Nassar as opposed to CP. Is that all right?

A. Yes.

Q. I reviewed Dr. Nassar's allegations with Mr. Jordan. I further explained that the evidence gathered during the investigation supports Dr. Nassar's participation in protected activity as he alleged in the charge and that Parkland's activities constitutes a violation of Title VII. Ms. Jordan questioned how is Parkland at fault if there is a contractual relationship between UT Southwestern and Parkland that requires Parkland to obtain needed agreement approval from UT Southwestern before Parkland is able to hire a physician from UT Southwestern.

Do you see that, sir?

A. Yes, ma'am.

Q. And this is EEOC federal investigator goes on to say: I explained to Ms. Jordan that any agreement between UT Southwestern and Parkland that overrides federal law statutes protected by EEOC constitutes a violation.

Do you see that, sir?

A. Yes, ma'am.

Q. And I assume that you would agree with the federal EEOC's investigative finding that any attempt to use the master services agreement to discriminate against someone or retaliate against someone who had brought discrimination charges would be absolutely wrong.

A. I agree.

Q. And that's exactly what you did, is it not, Dr. Fitz?

A. No, ma'am.

Q. Well, do you recall telling Dr. Keiser that Dr. Nassar, when he gave his letter of resignation on July 3rd, 2006, had publicly humiliated Beth Levine? Do you recall telling —

MR. HAGEN: Your Honor, is it appropriate to give a limiting instruction?

THE COURT: Yes, I will go ahead, and if you will hold that question and answer.

Ladies and gentlemen, Defendants' Exhibit 75 is similar to the other exhibit that I gave you a limiting instruction on that was an EEOC determination letter, and this is the same thing.

The Federal Rules of Evidence allow under certain circumstances for these findings of investigative agencies to be presented to a jury, but they are not binding on you. It is completely up to you to decide how much weight to give them. Just so you understand that they have a conclusion here, it's up to you to decide if you agree with it, disagree with it, agree with part of it, and you are not in any way bound by it. All right?

Q. (By Ms. Aldous) Dr. Fitz, did you or did you not tell Dr. Keiser that Dr. Nassar had publicly humiliated Beth Levine in his resignation letter?

A. Did not.

Q. Well, did you think that Dr. Nassar humiliated Dr. Levine when he accused her of discrimination?

A. That was far from my thoughts.

Q. Well, it's not a good thing for a physician such as Dr. Levine to be accused of discriminating against someone based on race, religion or creed?

A. My concerns were for Dr. Nassar.

Q. Do you think it's a good thing for Dr. Levine to have that on her record?

A. No, ma'am.

Q. And you wanted to protect her to the extent possible, did you not, sir?

A. I wanted to protect all to the extent possible.

Q. Well, if you're going to put one or the other in the pecking order at UT Southwestern, would Dr. Levine and her husband, Dr. Packer, have a lot more clout than Dr. Nassar?

A. Not necessarily.

* * *

JURY TRIAL EXCERPTS

MAY 19, 2010

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NAIEL NASSAR, MD, *Plaintiff,* v. UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, PARKLAND HEALTH & HOSPITAL SYSTEM, BETH LEVINE, M.D., AND J. GREGORY FITZ, M.D. *Defendants.*	§ § § § § § § § § § § § § §	Civil Action No. 3:08-CV-1337-B

JURY TRIAL

May 19, 2010

Before: The Honorable Jane J. Boyle
United States District Judge

CERTIFIED TRANSCRIPTION

I, Shawnie Archuleta, CCR/CRR, certify that the foregoing is a transcript from the record of the proceedings in the foregoing entitled matter.

/s/

July 30, 2010

* * *

[4]

J. GREGORY FITZ, M.D.,

having been previously sworn, testified as follows:

CONTINUED DIRECT EXAMINATION

BY MS. ALDOUS:

Q. I'm going to try to not repeat anything I asked yesterday, but I would like to recap a little bit about what we were discussing yesterday.

First of all, there are two categories of questions I'm going to be asking you about.

A. Yes, ma'am.

Q. And we're going to talk about the work environment Dr. Nassar was subjected to after Dr. Beth Levine came to UT Southwestern in late 2004. All right?

A. Yes, ma'am.

Q. You have to answer out loud, so the court reporter can take it down. I'm a mother, so it comes easy to fuss.

And the second thing I want to talk to you about, the second category, is your actions in blocking Dr. Nassar going to work for Parkland Hospital. All right?

A. I understand the topic.

Q. And you do agree that you blocked Dr. Nassar from going to work at Parkland.

A. Yes, ma'am.

Q. Okay. You did not allow that to happen.

A. In April, per the affiliation agreement.

Q. Okay. So you're telling the jury that the only time you blocked Dr. Nassar going to work for Parkland was in April of 2006.

A. Yes, ma'am.

Q. Okay. You never had any discussions with Dr. Ross or anyone else in July of 2006 about your desire to block Dr. Nassar's going to work at Parkland. Is that what you are telling the jury?

A. We may have discussed it. The line of thought was the same, going back to April, but never did I see a letter of offer to Dr. Nassar. I didn't know that one had been generated that was within Parkland.

Q. Well, you know as we sit here today; you have seen it.

A. Yes, ma'am. Yes, ma'am, through the trial developments. But I was completely unaware of that.

Q. So if we look at the objective evidence, that is the documents that we have, and not talk about what you did or what you knew or what you believe happened, the objective evidence that we have and that we've seen through e-mails and documents is that, number one, in April of 2006 you knew that Dr. Nassar wanted to go to work for Parkland, true?

A. Yes, ma'am.

Q. Because you had discussions with Dr. Ross about that, correct, sir?

A. And Dr. Nassar.

Q. And you also knew in April of 2006 that Dr. Nassar believed that Dr. Levine was discriminating against him, didn't you, sir?

A. I do not think I knew that then.

Q. If Dr. Nassar tells the ladies and gentlemen of this jury that he had several conversations with you as his department chair saying, Dr. Fitz, I feel like I'm being discriminated against because I'm a Muslim, are you telling the jury those conversations did not happen or that you just don't recall?

A. I did discuss with Dr. Nassar through the promotion and tenure process that he was being evaluated. This was not couched in terms of religious discrimination.

Q. Okay. Sir, that wasn't my question. I want you to be sure, and I want the jury to understand. You would agree that as early as the early months of 2006, let's say March — February, March, April, when Dr. Nassar was up for a promotion, you knew that Dr. Nassar felt like he was being discriminated against by his boss, Dr. Beth Levine, did you not, sir?

A. No, ma'am.

Q. That never came up.

A. No, ma'am. I think the first time was in late April, early May.

Q. Oh, okay. So now you believe that Dr. Nassar first told you that he thought he was being discriminated against in late April or early May of 2006, correct?

A. Those words were not used.

Q. Did he tell you he thought he was being treated unfairly?

A. No, ma'am. I'm happy to tell you the conversation as I remember it.

Q. Okay.

MR. HAGEN: Your Honor, I believe this is subject to a motion in limine that the plaintiffs had in place. May we approach?

THE COURT: If you think we need approach, all right.

MR. HAGEN: I think we do, Your Honor.

(Discussion held at the bench off the record.)

Q. (By Ms. Aldous) This is my very narrow question, Dr. Fitz: Would you agree that in April or May of 2006 Dr. Nassar had issues with Dr. Beth Levine?

A. Yes —

MR. HAGEN: Objection, vague, Your Honor.

THE COURT: Overruled.

Q. (By Ms. Aldous) I'm sorry?

A. Yes, ma'am.

Q. And this is right around the same time that you learned that Dr. Nassar wanted to go work for Parkland but still see the same patients that he was seeing, correct?

A. No, ma'am.

Q. Well, you had that discussion with Dr. Ross in April of 2006, did you not?

A. It was before this. And I believe my discussions with Dr. Nassar were in the March time framework, and that's my memory.

Q. Okay. So March of 2006 you knew that Dr. Nassar had issues with Dr. Levine —

A. No, ma'am. That's when we had discussions about transferring his job position to Parkland.

Q. Okay. And you understood that he wanted to transfer his job position to Parkland because he felt like it was a hostile work environment working for Dr. Levine; you knew that, did you not?

A. No, ma'am. That was not the context of the discussion.

* * *

[20]

Q. And Dr. Packer was Chair of the Department of Clinical Sciences, correct?

A. Yes, ma'am.

Q. And then under you was Dr. Levine, who was the Division Chief of Infectious Disease, correct?

A. Yes, ma'am.

Q. And now you, Dr. Packer, and Dr. Levine were all full-tenured professors, were you not?

A. Yes, ma'am.

Q. And Dr. Nassar was an assistant professor prior to his promotion, was he not?

A. Yes, ma'am.

Q. And an assistant professor is much lower on the rung than a division chair or division chief or a department chair, correct?

A. Yes, ma'am.

Q. Now, can you tell the jury one problem that you're aware of that Dr. Nassar had with any of his bosses at UT Southwestern from 1995 to 1998, when he was first there, and then again from 2001 until late 2004, when Dr. Levine arrived?

A. No, ma'am. I was not there in '95 and '98, and I was unaware of other circumstances; so, no.

Q. Okay. So it's undisputed that, before Beth Levine arrived at UT Southwestern, this man, Dr. Nassar, did not have one dispute, or you never heard anything about complaints; his record was clean, was it not?

A. Yes, ma'am, which is why we worked to get him promoted.

Q. I'm going to ask that you just answer my question, if you will, sir. You will have your chance to say your stuff when your lawyer talks to you.

A. I apologize.

Q. You say you worked to get him promoted. I am going to go ahead, since you volunteered that, and ask you about that. Did you just say that?

A. Yes, ma'am.

Q. So it's your testimony to the jury that Dr. Levine was one of the biggest advocates of Dr. Nassar? Is that what you are telling the jury?

A. Yes, ma'am.

Q. And you believe that because that's what Dr. Levine told you?

A. Yes, ma'am.

Q. Well, you did know, I assume, because it would be your job to know, sir, that Dr. Nassar, when he knew he was coming up for promotion, started having serious concerns that he was being singled out because of his race, religion or creed? You know that, don't you?

A. Now, in this courtroom, I do.

* * *

[25]

MS. ALDOUS: I can't remember my question now.

Q. (By Ms. Aldous) If, in fact, Dr. Keiser followed up — you know what, I will just move on. I have covered that.

Now, you heard Dr. Keiser testify that when Dr. Akbar — I believe he's from Pakistan — was hired by Parkland — in fact, Dr. Akbar was hired by Parkland, wasn't he?

A. By testimony, I know that.

Q. He wasn't hired by UT Southwestern, was he?

A. No, ma'am.

Q. So this was one of those exceptions to this master services agreement, that that was one of the ones you didn't block?

A. I don't think that's an answerable question.

Q. Did you block the hiring of Parkland of Dr. Akbar who was not a faculty member at UT Southwestern? Yes or no, sir.

A. No.

Q. Okay. And let me ask you this while I'm on that. You said — I'll get to that later. If Dr. Akbar, when it was announced in a meeting — if Parkland announced that Dr. Akbar from Pakistan had been hired by Parkland, and if Dr. Levine said what Dr. Keiser told the jury he heard her say, which was, they have hired another one, you would certainly find those kind of comments absolutely unacceptable.

A. Yes, ma'am.

Q. Offensive.

A. Yes, ma'am.

Q. If you thought somebody that you were supervising, when speaking of people of Middle Eastern descent, said, they hired another one, what would you do about it?

A. I would absolutely investigate it, evaluate it. It's not acceptable behavior.

Q. Have you ever asked the people that were round

Dr. Keiser when that comment was made? You just believed it wasn't true, didn't you?

A. No. In fact, the only time I heard this was in these court proceedings.

Q. Are you going to investigate it now, when you leave here?

A. If it could be recreated to find out. But I have discussed this with Dr. Levine, yes, historically.

Q. I understand you have discussed it with Dr. Levine. But are you now going to, since you heard all this stuff, go and talk to other people and say, I need to know, did Dr. Levine in this meeting, when she found out a doctor from Pakistan was being hired by Parkland, said, they hired another one, now that you know that was testified by a physician who was on staff at UT Southwestern for years, are you going to talk to somebody other than just Dr. Levine to see if, in fact, she said that, sir?

A. Clearly, I would investigate such. But again, I did not know about this until these court proceedings.

Q. Are you concerned now, sir?

A. Well, of course.

Q. Okay. So you have now learned information during the course of this trial that causes you concern as the supervisor, the chairman of this department. Why didn't you know about it before now?

A. I have lots of interactions with Dr. Levine, whom I assume you will meet later, that are counter to what you are describing.

Q. Okay. So what you are saying is, you went to Dr. Levine and she told you she didn't say it, and that's all you did about it?

A. Not on this specific point. I hadn't really heard this point.

Q. But you asked Dr. Levine — did you ask Dr. Levine, did you tell Dr. Nassar that Middle Easterners are lazy? Did you ask her that?

A. Same statement; this is not something I had heard until all of these court proceedings.

Q. Well, goodness gracious, Doctor, you had seen the letter, the July 3rd, 2006, letter, which is Exhibit — Plaintiff's Exhibit Number 15, where Dr. Nassar told you, I've had continued harassment and discrimination against me. I have been threatened with denial of promotion, loss of salary support, and potentially loss of my job. I have talked to other physicians of Middle Eastern origin who have similar barriers from Dr. Levine.

Was that not enough?

A. Of course I discussed it in great detail then and with others, with her and with others.

Q. And you just believe that Dr. Nassar wasn't telling the truth?

A. I was actually very saddened to receive that letter; shocked.

Q. Well —

A. I had not been aware of this sentiment.

Q. We all can agree on this, I think, Dr. Fitz, that in July of 2006 Dr. Nassar wanted to stay at Amelia Court and continue to treat the HIV patients who came to that clinic, did he not?

A. Yes, ma'am.

Q. And he had already been promoted to Associate Professor of Medicine at a very prestigious University, UT Southwestern, correct?

A. Yes, ma'am, with our full support.

Q. Something he had worked very, very hard for; you would agree with that?

A. Yes, ma'am.

Q. He wanted it very badly. And I assume you do not fault him for that, do you, sir?

A. No, and we were proud of the promotion.

Q. Would it stand to reason that the work environment, working under Dr. Levine, was so hostile and so harassing, that that is the only reason Dr. Nassar would go to Parkland and say, I want to keep seeing these patients, but please just let me be your employee. That makes sense doesn't it, sir?

A. I was not party to those discussions.

Q. That makes sense if that happened?

A. That would be one possibility.

Q. The most logical possibility that Dr. Nassar would want to leave UT Southwestern would be to get away from the hostility he was experiencing so he could just go to Parkland, give up being a professor

and just work and treat patients. That makes sense, does it not, sir?

A. It would be one possibility.

Q. It's a very logical possibility, is it not, Dr. Fitz?

A. Yes, ma'am. I'm sure Dr. Nassar feels that.

Q. And the facts support it, don't they, that's what happened?

A. I disagree.

Q. All right. Okay. Now I want to talk to you for just a minute about your activity relating to Dr. Nassar attempting to get a job at Parkland so he could continue his work at the Amelia Court Clinic.

We established yesterday, did we not, Dr. Fitz, that you blocked that employment because of the master services agreement or the — what is the other one called? — master affiliation agreement, correct?

A. Yes, ma'am.

Q. Okay. Now, I want to make sure I understand this. Are you telling the jury that under this agreement you could not allow Dr. Nassar to go work for Parkland, or are you telling them you just didn't think it would be a good thing?

A. I think both are true. I think that the master services agreement in this case, which really, to the benefit of both Parkland and UT Southwestern, allows a senior medical management team to be in place, would be ill-served if someone not a faculty member, not hired is — it's like an orchestra, almost played together. And so when the question was asked, I just happened to agree with that. I think we

needed to be a — the service works better as a unified effort.

Q. You just happened to agree with what?

A. I agree with the premise behind the affiliation agreement.

Q. I want to make sure I understand. Are you telling the jury that you could not allow Dr. Nassar, give your blessing — you heard Dr. Ross testify in his deposition that he needed your blessing for Dr. Nassar to go work for Parkland, right?

A. Yes, ma'am.

Q. Okay. And you don't dispute that.

A. I agree that that's the fact. That blessing was not specifically sought after April or so.

Q. So Ms. Moreno, you don't believe anything she said?

A. Oh, I absolutely do. But Ms. Moreno generated — all that testimony was — I was blind to all of that. I was unaware that that was ongoing.

Q. Well, no, you said in your affidavit —

MS. ALDOUS: And may I approach, Your Honor?

THE COURT: You may.

Q. (By Ms. Aldous) Let me hand you — you know what an affidavit is. That is a sworn, written statement that you sign under the penalty of perjury —

THE COURT: Excuse me, I'm sorry, but I want to make sure we don't have an electronic device being used in the courtroom because they are off limits in

the courtroom. You should have been told that. Close it up. Thanks. All right. Sorry.

MS. ALDOUS: That's okay.

Q. (By Ms. Aldous) You know that an affidavit is a sworn statement. And you actually executed this affidavit and understood that you were swearing everything in here was the truth.

A. Yes, ma'am.

Q. And in fact, you knew that this affidavit was going to be filed in this very lawsuit, did you not?

A. Yes, ma'am.

Q. And you were representing to the public, to the Court, to the jury, to everybody, that everything in here was true and correct, correct?

A. Yes, ma'am.

Q. That was double correct. But is that right, I should say?

A. Yes, ma'am.

Q. Now, in fact — and I think we covered this yesterday, but I want to make sure it's abundantly clear. On page 3 of your affidavit, paragraph 6, the last sentence says: My discussions with Dr. Ross continued into the summer of 2006, after Dr. Nassar submitted his resignation letter.

Did you state those words?

A. Yes, ma'am.

Q. And were those words true when you made them in this affidavit?

A. Yes, ma'am.

Q. Okay. So it wasn't just one time in April 2006 that you talked to Dr. Ross because Dr. Ross needed your blessing to hire Dr. Nassar, those discussions continued to the summer of 2006 according to your affidavit, correct, sir?

A. It's a parsing of words, ma'am. I mean, they were in April and then again — yes, by your words.

Q. I'm at a loss on how this is parsing of words when it says: My discussions with Dr. Ross continued into the summer of 2006, after Dr. Nassar submitted his resignation letter.

Do those words mean something other than what they say, Dr. Fitz?

A. Well, I apologize. I take your point.

Q. Did I misread it? Tell me if I did.

A. No, ma'am.

Q. Okay. So we know that you discussed with Dr. Ross in April of 2006, and we know those discussions continued until the summer of 2006, after Dr. Nassar submitted his resignation letter, true?

A. Yes, ma'am.

Q. And when Dr. Ross continued these discussions with you into the summer of 2006, you're telling the jury the reason you blocked this man's employment at Parkland was based upon Defense Exhibit Number 15, this master affiliation agreement, correct?

A. Yes, ma'am.

Q. And here's what I want to know, Doctor: Are you telling the jury that it was not — it would be a violation of this master services agreement if Parkland hired Dr. Nassar as they wanted to do? Is that what you are telling the jury?

A. I am not a legal expert. My understanding is that the master services agreement sets forth a structure to the advantage of both parties.

Q. My question is: You're the one that relied on the agreement in saying that Parkland couldn't hire Dr. Nassar. Is it because the agreements prevented that from happening; yes or no?

A. Yes.

Q. And I want to talk to you about what you said in your affidavit about the part of the agreement you relied on.

Now, you said you weren't a legal scholar, but I want to make sure — and I am not either, but I want to ask you this: You are telling the jury that you read Defense Exhibit Number 15 and, based upon your reading of Defense Exhibit Number 15, you blocked this man's ability to go to work at Parkland to treat HIV patients, correct?

A. Yes, ma'am, in that capacity.

Q. Okay. And you're saying that didn't have anything to do with the fact that Dr. Nassar had sent this letter saying that basically Dr. Levine was discriminating against Muslims and Arabs, that didn't even cross your mind?

A. Yes. The reason for my decision was herein.

Q. That wasn't my question. When you decided to look at this agreement to see if there was a way you could use it to block Dr. Nassar's employment at Parkland, did it even cross your mind that this man had accused Dr. Beth Levine, a very powerful woman at UT Southwestern, whose husband was very powerful at UT Southwestern, of harassment based upon his race, origin, religion or creed? Did that ever cross your mind, sir?

A. At the time the decision was made, such allegations had not been presented.

Q. Oh, sir, that's not true. On July the 3rd —

MS. ALDOUS: I'm sorry, Your Honor. I got worked up again.

THE COURT: Question, please.

THE WITNESS: Oh, you were in July.

Q. (By Ms. Aldous) We can go whenever. At any point in time, when you blocked this man's employment at Parkland Memorial Hospital, did it ever enter your mind that he had brought an EEOC claim and had made allegations against Dr. Beth Levine that she was discriminating against people of Middle Easterner origin to such an extent that it was a hostile work environment?

MR. HAGEN: Just objection. That's outside of the record and not supported by the record as to the EEOC charge.

THE COURT: Overruled. Again, this is cross-examination.

MS. ALDOUS: Do you remember the question? I don't.

THE WITNESS: I'm pretty close.

Q. (By Ms. Aldous) Okay.

A. In April, such allegations hadn't been made. In July, my memory is that Dr. Nassar resigned on the 3rd. The letter that you're referring to with the allegations against Dr. Levine I think I received on the 7th. And the response — I mean, I was — yes, absolutely, I was disturbed, upset, and saddened.

So I think the operative question is, was I asked at that time, was I shown a letter of employment for Dr. Nassar? And the answer is no.

Did it alter the decision made back in April? No.

Q. If the decision were made in April, clearly made by you in April, where you told Dr. Ross or whomever at Parkland, you can't hire Dr. Nassar because it would violate the affiliation agreement between Parkland and UT Southwestern, why in the thunder do you think Parkland continued to negotiate Dr. Nassar's salary, had him fill out employment applications, gave him a draft of a July 3rd, 2006, offer, if your decision had been made in April? Do you have any explanation for that, Dr. Fitz?

A. No, ma'am. That occurred, also in the affidavit, that I had no knowledge of any of those activities.

Q. It doesn't make sense, does it? If you said — let's talk about common sense here. If you said unequivocally to Parkland, you cannot hire Dr. Nassar to work at the Amelia Court Clinic as a Parkland employee because the master services or

affiliation agreement prevents it, if you made that abundantly clear, no question, it would stand to reason that Parkland would not probably continue to get Dr. Nassar to fill out employment applications, negotiate his salary, and things of that nature. That doesn't make sense, at least from a common sense standpoint, does it, Dr. Fitz?

A. Not as you present it. Parkland does employ doctors in their clinics elsewhere, and it's entirely possible that they were talking to Dr. Nassar in that context.

Q. Well, did you hear Ms. Moreno testify that they were talking to Dr. Nassar about Amelia Court because they needed the doctors, they were desperate for the doctors, and they were scared if he didn't continue to work at Amelia Court that patients were going to suffer?

A. Yes, ma'am, but I had no contact with Ms. Moreno during that period of time.

Q. All right. Now, I assume that you knew, since you were Dr. Levine's supervisor in January of 2006, that Dr. Nassar was very upset about the way Dr. Levine was handling his promotion, the things she was saying, the questions she was asking. You knew all of that, didn't you?

A. I knew that there was an investigation ongoing regarding the promotion.

Q. Okay. And so you at least knew that there were some issues between Dr. Nassar and Dr. Levine when you say you made this decision in April of 2006 that Dr. Nassar couldn't go work at Parkland.

MR. HAGEN: Just object, vague question.

THE COURT: Overruled.

A. Yes. And the decisions were in response to questions raised by the Promotions Committee.

Q. (By Ms. Aldous) Well, that's what you understand. You weren't there, were you?

A. That's what I understand.

Q. Okay.

MS. ALDOUS: May I approach the witness, Your Honor?

THE COURT: You may.

Q. (By Ms. Aldous) When I was questioning you yesterday about Defendants' Exhibit 15, this affiliation agreement that you say you used to block Dr. Nassar's employment at Parkland, I asked you specifically which paragraphs you were referring to, and I think you said 4c. Did I recall that correctly?

A. I believe that's correct.

MS. ALDOUS: May I approach, Your Honor?

THE COURT: You may.

Q. (By Ms. Aldous) If you want to look at it and verify it before I put it on the elmo?

A. Thank you.

Q. You bet.

My boss just corrected me and said it was 4a. Can you tell me which one it was?

A. This is not the affiliation agreement. This is my —

Q. I'm sorry. I gave you the wrong document. I apologize.

A. No problem.

MS. ALDOUS: May I approach, Your Honor?

THE COURT: You may.

THE WITNESS: Thank you.

MS. ALDOUS: You bet.

THE COURT: Mr. Hagen?

MR. HAGEN: I'm sorry, just a clarification. What paragraph are we reading, 4c?

THE COURT: Right now we are talking about D-15 and we are trying to figure out the paragraph.

Q. (By Ms. Aldous) Well, in your affidavit you said: The requirements of this attachment — talking about Defendants' Exhibit 15 — stated under paragraph 4c. Do you see that?

A. Yes, ma'am.

Q. Okay. So 4c is what you're telling the jury prevented Dr. Nassar to go work at UT Southwestern — at Parkland, correct —

A. Yes, ma'am.

Q. — in your interpretation of this reading.

A. Yes, ma'am.

Q. All right. And I want to put —

MS. ALDOUS: May I approach?

THE COURT: Yes.

Q. (By Ms. Aldous) I want to put this portion up on the elmo, Dr. Fitz, so we can see it hopefully very clearly.

In this agreement — and I will hand you the rest of it here. In this agreement it talks about — and by the way, this agreement was formulated on February the 9th, 1979, was it not?

A. I believe that's correct.

Q. Okay. So this was an agreement that basically was brought about between the Dallas County Hospital District or Parkland Hospital and UT Southwestern to ensure that the indigent patients that were being treated at Parkland received good care and to ensure that the physicians who were training at UT Southwestern had a patient population to obtain their training, correct?

A. Yes, ma'am.

Q. But we've already established that the number one goal by both entities, that is Parkland and UT Southwestern, should be patient care. We've agreed to that, correct?

A. Yes, ma'am.

Q. Everything else goes after that, true?

A. The others are absolutely tied in to the best patient care.

Q. Right. But you should never have a goal for you as a UT Southwestern member or for Parkland that would interfere with the very best care you can give to a patient, correct?

A. I agree with you.

Q. So if any — when you were actually thinking about Dr. Nassar and his possible employment at Parkland, that had to be in your mind as well, it should have been, correct, patient care?

A. Absolutely. That's the reason we promoted him.

Q. That wasn't —

MS. ALDOUS: I object, nonresponsive.

THE COURT: Sustained.

Q. (By Ms. Aldous) If you could just answer my question, sir. I want to make sure. When you made the decision that you did to block Dr. Nassar's employment at Parkland, you would agree with me and would tell the jury that it should have been in your mind what is best for the patient.

A. That's always in the mind, yes.

Q. Was it in your mind, sir, when you blocked his employment at Parkland?

A. Yes, that's always present.

Q. Okay. And it would certainly be wrong for you to try to use Defendants' Exhibit Number 15, this affiliation agreement, in an attempt to block Dr. Nassar if, in fact, that was not in the best interests of the patients at Amelia Court who were coming to see a doctor who could treat their life-threatening illness, correct?

A. Dr. Nassar is a fine doctor.

MS. ALDOUS: Objection, nonresponsive.

THE COURT: Sustained.

Q. (By Ms. Aldous) Could you answer my question, please, sir?

A. Could you repeat it, please, ma'am?

Q. I have a horrible memory.

THE COURT: I believe the court reporter can read it back.

(The record was read as requested.)

A. Correct.

Q. (By Ms. Aldous) You agree with that?

A. I think, yes.

Q. So if you try to use Defendants' Exhibit Number 15 in an effort to block Dr. Nassar because he brought harassment charges against your friend, Dr. Levine, and that decision to use this agreement to block his employment at Parkland was not in the best interests of patients, that would be absolutely unacceptable conduct by anyone, including yourself, Dr. Fitz, correct?

A. If that had taken place.

Q. Okay. Now let's talk about what you actually say you used or what prevented you in Defendants' Exhibit Number 15 from allowing Dr. Nassar to go treat patients at Amelia Court under the employment of Parkland, all right?

A. (Witness nods head.)

Q. We've got paragraph 4c on there. First of all, I want to look at the preceding paragraph. Regents — when regents is in this document, that applies to the

Board of Regents for the University of Texas Health Systems, does it not?

A. Yes, ma'am.

Q. When we see, "regents," that's applying to UT Southwestern, correct?

A. That's my understanding.

Q. When we see, "center," that's applying to UT Southwestern, correct?

A. The medical school, yes.

Q. So regents and center are UT Southwestern. With me?

A. Yes, ma'am.

Q. Okay. And "district" is the hospital, Parkland, correct?

A. Yes, ma'am.

Q. Now, if you want to look and actually read this paragraph that you say prevented Dr. Nassar from going to work for Parkland, this actual paragraph is talking about the responsibilities UT Southwestern had to Parkland to take care of their patients, correct?

A. Yes, ma'am.

Q. Number 4: For purposes of this agreement, the responsibilities of regents include, do you see that?

A. Yes, ma'am.

Q. So this isn't talking about what Parkland can or cannot do, it's talking about what you, as a member of UT Southwestern, is obligated to do if you're going

to fulfill this agreement with Parkland and its patients, correct?

A. Yes, ma'am.

Q. And the specific paragraph that you say you used to block Dr. Nassar's employment at Parkland, let's look at what it says, sir. It says that the UT Southwestern System — that is the regents — have a duty to supply a sufficient number of qualified physicians who are members of center faculty to adequately provide, direct and supervise physician medical services to all inpatients and outpatients of Parkland Memorial Hospital and other district healthcare facilities subject to paragraph 3 of the general provisions of this agreement hereinafter set forth. Total physician patient care will be provided, directed and supervised by faculty of center to patients of district. District house staff will participate in patient care under the direction of the medical staff.

Did I read that correctly?

A. Yes, ma'am.

Q. Okay. Now, if we're going to look at what that means, sir, what that means is UT Southwestern was contractually obligated to provide a sufficient number of faculty staff —

MR. HAGEN: Your Honor, objection. It's a legal explanation; argumentative.

THE COURT: Overruled. And I think this has been invited by the defense theory of the case and certainly by many of the questions. And I don't think

in any way the doctor has been presented as a lawyer by either side. Overruled.

Q. (By Ms. Aldous) If we're going to look at what 4c actually does, it is saying to UT Southwestern, okay, pursuant to this agreement, you, UT Southwestern, have a duty to ensure that Parkland is adequately staffed with physicians to treat patients and to supervise doctors in training. That's what it is saying, isn't it?

A. It's a duty we believe in.

Q. Okay. But where in there does it say, Parkland, you can't hire staff physicians yourself if we think it's needed to treat our patients? Where is that in there?

A. My inference was total physician patient care would be provided, directed and supervised by faculty of center.

Q. That's what you used to block Dr. Nassar's employment at Parkland?

A. That and a long history.

Q. Well, let's talk about the history, sir. The fact of the matter is, the very doctor who was hired when you — after you blocked Dr. Nassar, the very doctor that was hired by Parkland, who was not board certified in infectious disease, did not have an experience of treating HIV patients, she wasn't on the faculty of UT Southwestern, was she, sir?

A. I do not know to whom you refer.

Q. I'm referring to Dr. Deborah Morris-Harris.

A. I don't know Dr. Harris.

Q. I will represent to you, sir, that Parkland, after you blocked this man's employment for Amelia Court, hired Dr. Deborah Morris-Harris. You heard Dr. Keiser testify about that, did you not?

A. Yes.

Q. And Dr. Deborah Morris-Harris was never a faculty member at UT Southwestern, was she, sir?

A. Not to my knowledge.

Q. I have looked at everybody on the internal medicine infectious disease roster, and I don't see her name. Am I mistaken?

A. I do not know her.

Q. Well, goodness gracious, was that a violation of Defendants' Exhibit Number 15? Are you going to do something about that, to say Parkland shouldn't have done that?

A. I do not know anything about this hiring. It's my understanding that Parkland can hire people in the COPC without UT Southwestern involvement.

Q. Oh, so you were just using your political influence when Dr. Ross was trying to give you the courtesy, since Dr. Nassar had been on staff at UT Southwestern all of these years and had an exemplary record and, given the way that these two institutions work and the politics of the institutions, Dr. Ross was trying to get your blessing before they hired away a physician from UT Southwestern. But you didn't let it happen, sir, because this man had accused Dr. Levine of harassment based upon his race, religion or creed, correct?

A. I disagree.

Q. Okay. Well, let's look at what this agreement, Defendants' Exhibit Number 15, what else it says.

MS. ALDOUS: May I approach the witness, Your Honor?

THE COURT: You may.

Q. (By Ms. Aldous) I assume when you looked at this agreement, you looked at the totality. You didn't just pick out some language in there that would support your decision to get rid of Dr. Nassar and get him out of Dallas, right? You looked at everything?

MR. HAGEN: Objection; argumentative, Your Honor.

THE COURT: Sustained; rephrase.

MS. ALDOUS: I will rephrase.

Q. (By Ms. Aldous) I assume, when you looked at this agreement in an effort to block Dr. Nassar's employment at Parkland, you looked at the entire agreement, did you not, sir?

A. I have seen the agreement before, yes.

Q. Well, that's not my question. Did you look at all of it to make sure that you weren't just using this agreement to get rid of a man that you thought was accusing —

A. I see.

Q. — your colleagues of improper conduct?

A. That was not the purpose of the agreement. So yes, I'm familiar with the agreement.

Q. Did you look at the whole agreement, sir?

A. I have looked at it, yes.

Q. Did you look at it when you were blocking Dr. Nassar's employment at Parkland?

A. Yes.

Q. Okay. So I assume that you saw paragraph 8 of this agreement that says: Nothing in this agreement shall affect or prohibit subsequent agreements between the parties for joint employment and pro-rata apportionment of salaries and other related costs and expenditures. You saw that, did you not?

A. Yes, ma'am.

Q. And the bottom line is — let me ask you this first: Do you still have your affidavit up there, or did I take it from you?

MS. ALDOUS: May I approach, Your Honor?

THE COURT: You may.

Q. (By Ms. Aldous) Let me hand you your affidavit again, if I could, Dr. Fitz. And in your affidavit you stated that the reasons that you blocked Dr. Nassar's employment at Parkland was because of Defendants' Exhibit Number 15, this master affiliation agreement. We have established that, correct?

A. Yes, ma'am.

Q. And if you look at page 2 of your affidavit, you also said: The requirement of this attachment — talking about Defendants' Exhibit Number 15 — and the interest I just outlined in this affidavit were the sole causes of my objection to the employment arrangement that Dr. Nassar sought for himself at Amelia Court through Parkland at that time.

Do you see that language?

A. No, ma'am. I haven't found that.

MS. ALDOUS: May I approach?

THE COURT: You may.

Q. (By Ms. Aldous) If you look at page 2 of your affidavit, right here.

A. Oh, thank you. Thank you.

Q. Do you see where you say: The requirements of this attachment — which is Defense Exhibit Number 15 — especially the responsibilities of regents stated under paragraph part c on page 2 of the agreement and the interest I just outlined in this affidavit were the sole causes of my objection to the employment arrangement that Dr. Nassar sought for himself at Amelia Court through Parkland at that time.

Do you see that, sir?

A. Yes, ma'am.

MS. ALDOUS: May I approach?

THE COURT: You may.

Q. (By Ms. Aldous) I don't want to put my marked-up notes on there, so let me put up on the elmo, if I could, Doctor, what those goals were that you have in your affidavit that you said was — were the reasons that you —

MR. HAGEN: Your Honor, objection; improper impeachment on this.

THE COURT: In what way?

MR. HAGEN: I don't think he's testified inconsistent with any of these reasons, Your Honor.

THE COURT: Well, here's the issue —

MS. ALDOUS: Do you want me to take the affidavit?

THE COURT: I tend to agree, Mr. Hagen. The exhibit, itself, is not admissible as a whole, so it shouldn't be displayed in that fashion to the jury. You can certainly ask him questions, and you can state what's said in there when you ask him questions because it's his affidavit, but otherwise displaying it, I agree; sustained.

Q. (By Ms. Aldous) First of all, you said there were two different aspects of your decision to block Dr. Nassar. One was Defendants' Exhibit Number 15, this agreement, correct?

A. Yes, ma'am, the affiliation agreement.

Q. And the other reasons were the goals that you thought needed to be achieved pursuant to that agreement, correct?

A. Yes, ma'am.

Q. Okay. And, for instance, there's three different goals that you believe you needed to achieve that would require you to block Dr. Nassar's employment at Parkland, correct? The first one is: Secure UT Southwestern faculty and medical students' access to important teaching and training environments serving the UT Southwestern's mission to educate.

Did I read that correctly?

A. Yes, ma'am.

Q. Okay. Now, how in the world would Dr. Nassar, going to work at Parkland in the Amelia Court Clinic, prevent UT Southwestern faculty and medical students access to important teaching and training environments?

A. I think it's important that all of the physicians in the clinic have a common mission and a common structure.

Q. But you're telling the jury that Dr. Nassar, practicing as a Parkland employee at Amelia Court, would not allow the UT Southwestern faculty and medical students access to important teaching and training environments. Is that your testimony?

A. I think it's beyond that. I think that we have many, many —

MS. ALDOUS: Objection, nonresponsive.

THE COURT: Sustained.

Q. (By Ms. Aldous) Is it your testimony that, if you had allowed Dr. Nassar to work at Amelia Court as a Parkland employee, that would have prohibited or impaired UT Southwestern faculty and medical students access to important teaching and training environments. Is that your testimony?

A. We would have been disadvantaged by doing so.

Q. Did you think about the patients?

A. Yes, ma'am.

Q. Do you think maybe they would have been disadvantaged by a man who had devoted his life to treating HIV patients, who was double boarded, not being there, do you think maybe patient interests

maybe should have been first in this rather than what you wanted?

A. We agree that both are important.

Q. Well, you can't use one if it's going to hurt patient care, can you?

A. No.

Q. And that's exactly what you did, isn't it, Doctor?

A. No, ma'am.

Q. Okay. Well, the second thing that you said — goal that prevented you from allowing Dr. Nassar to be hired at Parkland was to permit UT Southwestern faculty access to patients who might elect to participate in important clinical trials serving UT Southwestern's mission to research. How in the thunder would Dr. Nassar, working at Amelia Court as a Parkland employee treating HIV patients, affect UT Southwestern's clinical trials?

A. Same answer.

Q. Well, let me tell you something, are clinical trials more important, or are the treatment of patients with life-threatening illnesses, sir?

A. They are both important.

Q. Do you compromise one for the other?

A. No, ma'am.

Q. Ever?

A. No, ma'am.

Q. And that's exactly what you did, is it not?

A. No, ma'am.

Q. And the third goal is: Permit an organized medical management structure in the operations of the units or district clinics addressed by the agreement furthering our — UT Southwestern's — opportunities to educate and research. They have also given UT Southwestern substantial control of the quality of patient care and other operations at the facility. How in the world would Dr. Nassar's employment by Parkland at Amelia Court adversely affect that goal?

A. The same answer. I think it's very important that the physicians and all in the clinic be working for the same goals.

Q. Are you going to go to Parkland and say, why in the world did you hire Dr. Deborah Morris-Harris when she's not a faculty member at UT Southwestern and our agreement requires it because that's why I blocked Dr. Nassar?

A. I would certainly like to know more about it.

Q. That doesn't make sense. If what you're saying about this agreement is right, what's allowed and what's not allowed, well, it sounds like Parkland violated the agreement when they hired Dr. Morris-Harris, doesn't it?

A. I do not know any specifics.

Q. Is that curious to you that Parkland hired a doctor that wasn't —

A. Yes, ma'am.

Q. Okay. It doesn't make logical sense if what you're telling the jury is the truth, correct, sir?

A. I don't know the facts.

Q. If, in fact, it happened, does it make sense that what you are telling these folks is true?

A. There would be inconsistencies. I just don't know the facts, ma'am.

Q. Okay. Well, the last thing I want to ask you about, sir, is you said yesterday, I asked you about Exhibit—

MS. ALDOUS: May I approach?

THE COURT: You may.

Q. (By Ms. Aldous) — Plaintiff's Exhibit Number 15, which is the resignation letter of July 3rd, 2006, that Dr. Nassar sent to you. He sent it to you, correct?

A. Yes, ma'am.

Q. And I asked you yesterday if this letter would be a bad thing for Dr. Levine. And I think your answer — and correct me if I'm wrong — was, well, I was more concerned about Dr. Nassar. Is that your testimony?

A. At the time, yes.

Q. Okay. At the time?

A. At the time of this.

Q. At the time you didn't think, oh, my gosh, we've got a woman, Dr. Beth Levine, who is in a high-level position at UT Southwestern, a division chief, a full professor of medicine, and she's being accused of harassment and discrimination against people based on their ethnic origin and religious background, you

didn't think that would be a bad thing for UT Southwestern?

A. That would be a bad thing for UT Southwestern.

Q. Really bad, wouldn't it?

A. It would be bad.

Q. That isn't something you would want the public to know about, is it?

A. We wouldn't want it to happen, and we wouldn't want anybody to know about it without a real thorough investigation.

Q. Yeah, without a real thorough investigation. And it certainly would look bad if you have this woman who is being accused of harassing Muslims and Arabs in the work environment and her husband is also a high-level faculty member, that could be very embarrassing to UT Southwestern, could it not?

A. Yes, ma'am.

Q. And the best thing for UT Southwestern to try to do is to sweep it under the rug and get Dr. Nassar out of there, right?

A. No, ma'am. The best thing to do would be to understand if it happened.

* * *

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CROSS-EXAMINATION

BY MR. HAGEN:

Q. Dr. Fitz, before we get you a proper introduction to the jury here, out of the box, you understand you

are under oath, and the question that I have for you is this: Did you ever take the position objecting to Dr. Nassar's attempt to change his employer from UT Southwestern to Parkland Hospital while continuing on in his duties as associate director of Amelia Court Clinic because he had ever complained to you in any way, shape or form of Dr. Levine in regard to a racial issue, national origin issue or a religious issue?

A. No, sir.

MS. ALDOUS: Objection.

THE COURT: Excuse me, your objection?

MS. ALDOUS: That's okay.

Q. (By Mr. Hagen) What's your answer?

A. No, sir.

Q. When did you remember first objecting to Dr. Nassar's attempt to change his employer from UT Southwestern to Parkland while continuing on in his same duties as associate director of Amelia Court Clinic?

A. It would have been in March or early April that I first heard about it of 2006.

Q. Do you remember if you -- does anything refresh your memory in terms of knowing that by mid-April of 2006 you had objected?

A. There were e-mails that were produced as part of this — these proceedings that addressed that.

Q. Would you, first of all, look at Defendants' Exhibit Number 56?

MR. HAGEN: This is an e-mail that is already in evidence, is it not, Your Honor?

THE COURT: This is Defendants' Exhibit 56?

MR. HAGEN: Yes, Your Honor.

THE COURT: Defendants' Exhibit 56 is in evidence.

Q. (By Mr. Hagen) Okay. Is this the e-mail that makes clear whether you had objected already by mid-April 2006 to the arrangement that he sought out for himself?

A. Yes, sir. It makes it clear that Dr. Ross and I assume the recipient, Ms. Moreno, were aware.

Q. Is this the e-mail that Ms. Moreno saw yesterday when Mr. Gibson was examining her? Do you remember?

A. I believe so. It was hard to see from my corner over there.

Q. Okay. Do you remember if this was the e-mail that Mr. Gibson read by changing the pronouns that was in place here that, yes, I talked to Dr. Fitz about Dr. Nassar becoming a Parkland employee, and Dr. Fitz does not support the idea? Do you remember that?

A. Yes, sir.

Q. Okay. And that is dated when?

A. April 17th, 2006.

Q. And that came from Sam Ross, is that right, Dr. Ross?

A. Yes, sir.

Q. Okay. And who is Dr. Ross?

A. Dr. Ross at that time was the Chief Medical Officer for Parkland.

Q. Okay. By the way, did you have any conversations that you can remember, between that April time frame with Dr. Ross and July time frame, when you received the resignation letter from Dr. Nassar?

A. Not on this topic. We talked frequently.

Q. Okay. In your affidavit testimony, did you testify that your conversations continued into the summer of 2006?

A. Yes.

Q. Okay. When, after you spoke with Dr. Ross in April of 2006, did those conversations recommence and continue into 2006?

MS. ALDOUS: Objection, leading.

THE COURT: Sustained; rephrase.

Q. (By Mr. Hagen) Sure. Do you remember the passage you were looking at, in terms of the summer of 2006 in your affidavit, what paragraph that is?

A. Yes.

Q. Here's your affidavit testimony, if we could just clarify this one issue. Have you looked at it?

A. Yes.

Q. What — could you read the complete sentence and put it into context and explain what it means?

A. In Section 6, the last sentence: My discussions with Dr. Ross continued into the summer of 2006, after Dr. Nassar submitted his resignation letter.

Q. Okay. Now, going back before then, could you put it into context and read the prior sentences?

A. The context was that there was a conversation with Dr. Nassar and a brief one with Dr. Ross about a suggestion, a request on the part of Dr. Nassar, that he be allowed to switch his employment and remain a medical director.

Q. When did that occur?

A. Also, I would — well, before this e-mail, before April 17th.

Q. Okay. So did you continue to talk with Dr. Ross on this topic in late April, May and June on this topic?

A. I thought — no, we did not discuss this topic. We discussed many topics. I thought this one was settled.

Q. When did you recommence talking about the topic of Dr. Nassar and his prospects of moving to Parkland Hospital?

A. Following Dr. Nassar's resignation.

Q. Okay. What happened, then, in terms of your conversations with Dr. Ross?

A. We had a meeting about a number of issues. There was not again a formal specific request to reconsider this, and we continued forward without any change in that structure.

Q. When was it? What time frame was it that you recommenced these conversations?

A. I do not have a specific date. I remember receiving Dr. Nassar's resignation on July 7th, so it would have been in that time context.

Q. Okay. Thank you. Now, going back for clarification — I'm sorry, may I take the balance of that? Thank you. Just circling back to the timing of these communications, the first one you indicated here was July 17 — or by July 17 of — I'm sorry, by April 17 of 2006 you had communicated your objection; is that right?

A. Yes, sir.

Q. Okay. Now, when was the very first time that Dr. Ross — I'm sorry, that Dr. Nassar ever put onto your radar screen in any way, shape or form anything that you could construe even remotely as some sort of a complaint or issue even with Dr. Levine as it pertained to religion or Dr. Nassar's national origin, the very first time?

A. Late April, early May.

Q. How do you know that?

A. I had a discussion with Dr. Nassar.

Q. Okay.

MR. HAGEN: Your Honor, permission to ask about the content of that discussion?

THE COURT: Is this the subject of a motion in limine?

MR. HAGEN: Yes, Your Honor.

THE COURT: I think perhaps we ought to clarify, unless you are both clear on what this means.

MS. ALDOUS: I am not.

THE COURT: All right. Come around.

(Discussion held at the bench off the record.)

THE COURT: For the record, I am granting your request to get into those issues that were formerly a topic of a motion in limine.

Q. (By Mr. Hagen) When was it that you said for the very first time in your memory Dr. Nassar made any hint of a complaint about anything that you could interpret as an issue of religion and national origin as related to Dr. Levine and Dr. Nassar?

A. Again, I believe late April, early May.

Q. What was the content of that communication, and who did it come from?

A. From Dr. Nassar; and we had a conversation in which he indicated that he had been invited to a party by Dr. Levine where the people in her division that had successfully been promoted had gone through the promotion process were invited to her house. Champagne was served, and that was against — he was offended by that.

Q. Do you have a specific memory of him indicating that sort of thing around that time frame?

A. No, sir.

Q. Okay. Do you have a memory of him raising the issue of the champagne reception either in late April or sometime in May?

A. Yes, sir, that's my understanding.

Q. Okay. So prior to that communication, had Dr. Nassar ever said, I have a problem with Dr. Levine because I think she's out to — she's discriminated against me because of my religion or my national origin?

MS. ALDOUS: Objection, leading.

THE COURT: Sustained; rephrase.

Q. (By Mr. Hagen) At any point prior, was there any communication from Dr. Nassar on an issue that could possibly be looked at as protected activity?

MS. ALDOUS: I'm going to have to object.

THE COURT: I'm going to permit it. Go ahead.

A. I certainly did not interpret it as such.

Q. (By Mr. Hagen) Okay. I apologize. Would you look at Defendants' Exhibit 15, please, Dr. Fitz? I'm sorry, Defendants' Exhibit 14. No — yes, it's 14. Do you have it there?

A. Yes, sir.

Q. Okay. Do you see at or near the bottom of page 14 you communicated a list of information there. Are those your words and your writings?

A. Yes, sir. This is an e-mail on April 27th from me, I believe, to Sam Ross, although that's not linked here.

Q. Okay.

MR. HAGEN: We would move for the admission of Defendants' 14.

THE COURT: Any objection?

MS. ALDOUS: Of 14?

MR. HAGEN: Yes, Your Honor.

THE COURT: Defendants' Exhibit 14.

MS. ALDOUS: Just one moment. We have no objection, Your Honor.

THE COURT: Defendants' Exhibit 14 is admitted.

(Defendants' Exhibit 14 admitted into evidence.)

Q. (By Mr. Hagen) Okay. Would you please go ahead and just, first of all, tell me or tell the jury what the — what the gist of this communication is that you made on April 27, 2006, to Dr. Ross about Dr. Nassar.

A. This was a communication from me to Dr. Ross concerning an employment structure for Dr. Nassar. Okay. Would you read it to the jury, please, beginning — well, put it into context. What were the agenda items here that you were addressing for Dr. Ross?

A. There were several. The first is that Dr. Nassar approached me about his funding through the Ryan White Bill that we discussed briefly yesterday. It was my first encounter with the Ryan White Bill, and he expressed concern that his seeing patients in the hospital as compared to out of the hospital might not be supported.

And the question from me was, do you want to be seeing the consult patients in the hospital? The response was yes. And I said, well, to be sure, let's — let's cover that portion of your salary through an

alternative mechanism so that we can, while we investigate this, make him — be sure he was comfortable.

Q. Okay. What other items are you covering there?

A. Well, that was point one. And then second is, after a pretty long discussion, he indicated at the end of the discussion that his — his questioning on the Ryan White Bill had more to do with a desire to be a Parkland employee. And so I expressed to him personally at that time that our operating agreement with Parkland really would be against such a structure.

Q. Okay. So would you please read — I'm sorry. Did he leave you with any impression, by the time that meeting, that he was in agreement or disagreement with your objection?

A. It was my impression at the time that he understood and was going to proceed as before.

Q. Proceed how?

A. As a faculty member. He had just been promoted by this time, and it was my assumption then, in going forward, that he was, as of the turn of the next year, to be promoted and fully active in Amelia Court.

Q. Did this settle the issue, or did Dr. Nassar come back to you in subsequent weeks and months on the same topic?

A. He did not.

Q. Okay. It says: As per discussion, it would be against our operating agreement with Parkland to

have them employ faculty directly, so we cannot go there. He is okay with this.

Is that what it says?

A. Yes, sir.

Q. Okay. Did you think that this was the end of the matter?

A. Yes, sir.

Q. Okay. You've been asked several questions about the operating agreement. And may I ask you to look at Defendants' Exhibit 15 and go to the paragraph that you were asked specifically questions about within paragraph 14.

A. 4c?

Q. Yes, sir. And Dr. Fitz, the question is: I mean, did you carry around this agreement in your back pocket, or did you — then, back in 2006, or did you have a general understanding of it? What was your understanding?

A. I did not carry the agreement around. I had a general agreement from my few years at the time at UT Southwestern about the intent and the structure of the relationship that, again, advantaged both Parkland and UT Southwestern. It was good for all parties.

Q. Okay. Now, with respect to the section that you were asked to read under paragraph 4c, could you please read that to the jury?

A. The highlighted part?

Q. Yes, the highlighted part in particular.

A. Total physician patient care will be provided, directed and supervised by faculty of center to patients of district.

Q. Okay. In your opinion, is that the provision that you were taking into consideration in making the decisions in April of 2006, or was there something else?

A. That was the provision.

Q. A name has come up, Ms. Morris, a Dr. Morris. Do you remember being asked questions about her?

A. No, sir.

Q. I'm sorry?

A. I remember today.

Q. Okay.

A. I do not remember.

Q. And in terms of today, do you remember a Dr. Morris or —

THE COURT: Harris.

MR. HAGEN: Harris.

Q. (By Mr. Hagen) There was the suggestion that she got hired by Parkland Hospital to work at Amelia Court Clinic directly. Do you remember that?

A. I do remember the question.

Q. Did her — the facts of her situation, her employment by Parkland, ever come across your desk in 2006 or since then?

A. No, sir.

Q. To your knowledge, did Dr. Harris — did she — was she ever employed by UT Southwestern like Dr. Nassar was?

A. Not to my knowledge.

Q. Did she ever attempt to change her employment directly between UT Southwestern and Parkland Hospital so that — in a fashion that would continue on having her work at Amelia Court Clinic like Dr. Nassar?

A. Not to my knowledge.

Q. Was Dr. Harris at any time associate director of Amelia Court Clinic the way Dr. Nassar was?

A. No, sir.

Q. In terms of Dr. Nassar's position there, what was his title in 2006 at Amelia Court Clinic?

A. He was the associate medical director.

Q. And who was the director of Amelia Court Clinic?

A. Dr. Keiser, who testified yesterday.

Q. Okay. Under your understanding of what Dr. Nassar wanted to do in April or even earlier, maybe March of 2006, when it came to your attention, what was it that you understood he sought to do precisely with his employment situation?

A. My understanding was that he wanted to continue to work in Amelia Court in a supervisory manner to, in essence, just have a different source of his paycheck.

Q. Okay. Are there reasons, other than that legal conclusion that's present in the affiliation agreement, that either makes sense or doesn't make sense to you?

A. There — that would be an arrangement that would not make sense to me, and it's unrelated to Dr. Nassar's great skills as a physician. The real need for and a closely associated affiliated team of physicians and trainees working together with common shared goals is very important to the long-term success of the patient care mission and all the other missions, and I thought that this would diverge from that structure.

Q. Does Parkland tend to pay its physicians more than UT Southwestern?

A. The Parkland physicians that work elsewhere in the COPCs do tend to make more money, but I have never — that's an impression, that's not fact-based.

Q. Okay. We will stop there for a second. COPCs. The jury has no idea what you are talking about. What are COPCs, as you understand them to be?

A. The area surrounding Parkland Hospital, the health district, which encompasses Amelia Court and the large inpatient structure and the other outpatient clinics, is immediately adjacent to our medical school. And that health district is the area where this cooperative relationship between Parkland and the medical school and the medical faculty for training and education is where this affiliation is targeted.

Parkland, in addition, geographically separate from that, has a series of outpatient clinics that play a very important role in Parkland's mission to provide healthcare, not just in that hospital, but elsewhere around Dallas County.

And so Parkland always employs the physicians in those outpatient clinics in the time that I have been here, and they may or may not be faculty members, depending upon their other activities.

Q. If Parkland employs people at COPCs — and by the way, does COPC stand for something, as you understand it?

A. I think it is Community Outpatient Clinic.

Q. Or Community Oriented Primary Care Clinic, could that be a possibility?

A. That would be good, too.

Q. Okay. If Parkland Hospital, deciding to employ physicians at Community Oriented Primary Care Clinics in the regional Dallas area, not at Parkland Hospital, do they need your or UT Southwestern's approval to do so?

A. No, sir.

Q. Okay. So if a doctor hired by Parkland Hospital serves in a clinic that's a COPC, do they, to your knowledge, also treat HIV/AIDS patients at times there?

A. Yes, sir.

Q. As a consequence of that hire and that affiliation with the COPCs, do any of those doctors visit

Parkland Hospital to see patients at times, including Amelia Court Clinic, if you know?

A. Yes, sir.

THE COURT: Mr. Hagen, I would like to go ahead and break for a longer break. I promised the jury. We will break for 15 minutes. Ladies and gentlemen, please remember not to talk about the case, and we will start back up in 15 minutes.

(Recess taken from 10:54 to 11:11.)

THE COURT: Continue, Mr. Hagen.

Q. (By Mr. Hagen) Dr. Fitz, to try to just further educate the jury, if we could, about the affiliation that's going on here and some of the terminology, let me ask you with respect to the affiliation itself, did you write into an affidavit what the reasons were that you thought existed that made that provision that you relied on in making the decision about Dr. Nassar? Did you state reasons why you thought that provision made sense?

A. Yes, sir.

Q. Could you summarize those again really quick for the jury?

A. Would you like for me to read them?

Q. You can actually say them from memory to the extent you can.

A. The — there are a number of reasons. Among the more important one is that we are a medical school, and we're training medical students and residents at different stages and infectious disease fellows, as has been referred to. It's a big operation, with, you know,

2,000 faculty or so. And internal medicine had about 150 residents and at least that many residents at different stages.

And so the ideal environment is where the clinical care and the education takes place in one setting where they can feed one into the other and help, because, at the end of the day, the residents and the infectious disease fellows do a lot of the patient care supervised by the faculty. And that's a graded amount of effort. And so having a structure where this team can really create the best educational environment is important and is valuable to both parties.

Q. Dr. Fitz, I'm sorry. This is in answer to the question of why the UT Southwestern Medical School should be the exclusive provider of physicians at Parkland Hospital, including Amelia Court Clinic?

A. Yes, sir.

Q. Okay. Briefly, are there a couple other reasons?

A. Also, briefly, we think that the ability, again, to engage in a coherent pattern of behavior that promotes the best research, and that can be quality care, utilization of resources and other drug treatments, for example, is also really fostered by this kind of a structure.

And finally, it works best for Parkland. It's been proven over the years that they have really good doctors from UT Southwestern that are dedicated to the shared mission to take care of people that really need it.

Q. What happens, in your opinion, Dr. Fitz, if the associate director of the Amelia Court Clinic is employed by Parkland and the director of the clinic is employed by UT Southwestern?

A. The — I mean, it sets up a situation where those — the leadership is reporting to two separate authorities that probably do have — or do have a shared mission in terms of patient care, but not necessarily in terms of the educational and other important things that we do.

Again, a lot of the patient care is through education. And typically, individuals in that setup, you need to be a faculty member and have a faculty appointment to participate in the training of medical students and the training of residents and other physicians along that way.

And so there are many, many such visits in the medical district, I think the number approaches a million or so a year now, and we are totally committed to it. And the way this whole operation is managed is through our faculty structure.

Q. We've heard some testimony, I think, about a few other doctors who became employed by Parkland Hospital and who ended up seeing patients, at least from time to time, at Amelia Court Clinic. Do you recall that?

A. Yes, sir.

Q. Dr. Akbar was one of them ultimately hired by Parkland Hospital doing HIV/AIDS work. Do you remember him?

A. Yes, sir.

Q. Okay. In terms of Dr. Akbar, did he switch from UT Southwestern employment to Parkland employment in the way that Dr. Nassar did?

A. No, sir.

Q. Or wanted to?

A. No, sir.

Q. Okay. Dr. Armas, was that the facts of her situation?

A. I don't know Dr. Armas.

Q. Dr. Bernal, was that the facts of her situation?

A. I don't know Dr. Bernal.

Q. If Dr. Nassar had wanted to resign his position and get a job with Parkland Hospital working in their Community Oriented Primary Care Clinic, would you have had any objection at all to that?

A. No, sir. I have no jurisdiction over that.

Q. Okay. Would you have had any objection to it?

A. I would have been disappointed to lose a valuable faculty member.

Q. Would you have had any objection to his going in terms of if you were asked the question?

A. No, sir.

Q. Were you ever asked the question, Dr. Nassar wants to go work in a Community Oriented Primary Care Clinic by Parkland Hospital?

A. No, sir.

Q. And again, what question were you asked?

A. Whether he could switch to Parkland employment and remain in his existing role within Amelia Court.

Q. And who asked you that question?

A. It was really through Dr. Nassar.

Q. Okay. Do you remember the time frame of this request to do that?

A. We reviewed it earlier, and I recall it was before mid-April.

Q. Okay. And what was the context of that meeting with Dr. Nassar?

A. Again, that was the meeting where we discussed issues around Ryan White funding, and that led into a desire on his part to consider employment through Parkland.

Q. Was that around the time that he was announced for promotion, do you know?

A. That would have been after that time.

Q. Okay. At Parkland Hospital, who did you talk to in taking the position objecting to this plan to switch employers but carry over the same duties at Amelia Court Clinic?

A. Briefly with Dr. Nassar and briefly with Dr. Ross.

Q. Anyone else?

A. I do not recall discussing it with anyone else.

Q. Did you discuss it with Sylvia Moreno?

A. No.

Q. Did you discuss it with Ms. Morgan, who did recruiting work for Parkland?

A. No, sir.

Q. Why did you not communicate with either of these women on this topic?

A. Well, they, as I understand it, work for Parkland and are engaged in hiring doctors to work at the Parkland based COPC clinics.

Q. Were you aware of whether Ms. Moreno or Ms. Morgan were communicating about a prospective job for Dr. Nassar?

A. No.

Q. Did you know either of these women in 2006 at all?

A. I had passing knowledge about Ms. Moreno through going to meetings together, but did not know her beyond that. I did not know Ms. Morgan.

Q. Did Dr. Nassar include you in any communications that he had with either of these women in 2006 about this plan that he desired to change jobs to Parkland Hospital but carry on his same duties at Amelia Court Clinic?

A. No, sir.

Q. Were you ever contacted as a job reference or for a job referral by Parkland Hospital in 2006 for Dr. Nassar?

A. No.

Q. Did Parkland ever ask you, is he a good doctor, bad doctor, mediocre doctor, any questions of that sort?

A. No, sir.

Q. And any conversations that you ever had with Sam Ross, Dr. Ross at Parkland Hospital in 2006, did you ever indicate that Dr. Nassar was in any way a bad doctor or mediocre doctor?

A. Never.

Q. Did you, in your opinion, ever provide Parkland Hospital anything that could be construed as a negative job reference or something to that sort?

A. No, sir.

* * *

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Q. When you were the Chair of Internal Medicine, can you give the jury just an idea how many doctors worked within that department?

A. The department grew over the years. And by the time — by the end of last year when I left, approximately 350, 375 faculty members divided between the different subspecialties of medicine, so cardiology and gastroenterology and infectious diseases, as you have heard, and kidney diseases and so forth.

And the heart of that was around the patient care issues, but also the training issues. So we would take individuals that finished medical school, ours or others, and they would come in to a very large and

really good residency training program and learn to be doctors of internal medicine.

And then many of them will, like Dr. Nassar, elect to pick an area within that to specialize. And so all of that — like in one of those mentioned. So all of those are housed, really, within one umbrella.

And then we interact broadly with the other departments of the school, surgery and neurosurgery, and such. And so all of these parts are really required to have a coherent program.

Q. Okay. So that's the Department of Internal Medicine. A subsection of it, do I understand correctly, is infectious diseases?

A. Yes, sir.

Q. And that, in 2006, was chaired by Dr. Beth Levine?

A. Yes, sir.

Q. And she still chairs that?

A. Yes, sir.

Q. Also in 2006 there were two other employees there, and Dr. Keiser was one of them?

A. Yes, sir.

Q. Did he report to Dr. Levine?

A. Yes, sir.

Q. Okay. And then finally Dr. Nassar, correct?

A. Yes, sir.

Q. And he was the Associate Director of Amelia Court Clinic, and he reported to Dr. Keiser and Dr. Levine?

A. Yes.

Q. Okay. You, yourself — I keep calling you doctor. Are you a medical doctor?

A. Yes, sir.

Q. Where did you come from — before you came to UT Southwestern Medical Center, where did you come from?

A. Immediately before this, I was the head of gastroenterology. I'm a liver transplant person traditionally, so I ran a gastroenterology training program at the University of Colorado.

Q. How long did you spend there?

A. 1996 to 2003.

Q. In terms of your history in university life as a physician and a doctor, as a doctor, can you break it into parts and briefly describe your biography?

A. Yes. I'm from North Carolina; went to medical school at Duke; finished in 1979. I then moved to San Francisco, the University of California-San Francisco, and stayed there for ten years doing residency training and education; and then training in really liver diseases.

In 1989, moved back to Duke and stayed there for seven years doing patient care and research and teaching. And so I stayed there for seven years before going to Colorado, as I mentioned. And so I was in Colorado for seven, I think, years before coming here.

Q. Also, your area of research, what is it?

A. It's liver cell biology, liver function.

Q. Do you teach still in that area?

A. Yes, sir.

Q. And finally, have you actually treated patients yourself as a practicing doctor?

A. Yes, sir.

Q. Would you look at Defendants' 24? Do you recognize Defendants' 24?

A. Yes, sir.

Q. And what is that?

A. It's a curriculum vitae, a summary of really the biography that I just mentioned to you.

Q. Do you know when it's updated as of, roughly?

A. In this case, no, sir.

* * *

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Q. (By Mr. Hagen) Dr. Fitz, looking around to the conditions in 2005 that concerned Dr. Nassar's employment, you already testified that this, Defendants' Exhibit Number 4, was his appointment letter that lasted through the end of August 2006; is that right?

A. Yes, sir.

Q. Is there typically a second of page of it, that looks like this, that has the employee's signature at the bottom?

A. Yes, sir.

Q. And in this case there's a signature above the line that says, Naiel Nassar M.D., and that's in August of '05, correct?

A. Yes, sir.

Q. Going forward from that point, we were talking about the subject of promotion, and my question for you was whether you decided by the end of 2005 that you would take action to promote Dr. Nassar. So what did you do?

A. Yes, sir. Dr. Levine proposed that we promote Dr. Nassar from assistant professor to associate professor.

Q. Was that in response to a solicitation that you issued in September of 2005?

A. A general one to all of the division heads.

Q. Okay. Was that an opportunity for any division head to put up for promotion faculty within their divisions?

A. Yes, sir.

Q. Is that what she did?

A. That's what she did.

Q. What did you do next?

A. I looked at it, and I thought the promotion was appropriate, a good thing to do, and had one rather technical concern that involved changing. I had made a request to change him from the clinical scholar track to the clinician track. There is no difference in the prestige. It's more of a description of what one is

actually doing, and so this was done to better increase his chances of a successful promotion, because it was a better description of what Dr. Nassar was actually doing.

Q. Did you confer with anybody about suggesting the track change or initiating that?

A. First with Dr. Levine, and then with Dr. Alfred Gilman, who was then the dean of the medical school.

Q. Did Dr. Gilman support the track change?

A. He did.

Q. Okay. And did you issue any recommendation letter to support what Dr. Levine you understood was supporting —

A. Ultimately —

Q. — in terms of the promotion?

A. Yes. Ultimately, the structure is that the department chairman recommends to the Promotions and Tenure Committee the reasons that we are requesting the review and then the promotion.

And so Dr. Levine worked with Dr. Keiser to develop a letter, and then she improved it. I saw it and further worked on it. And so it was ultimately a letter representing the strong support of the department that went forward to the Promotions and Tenure Committee recommending that they review him for this.

Q. Touching on the track change, since that has been an issue raised I believe in the case by the plaintiff, was there any negative consequence

whatsoever in terms of his prospects for future raises and so forth as a result of the track change?

A. No, sir.

Q. Would you look at Defendants' Exhibit 6 in your binder, please? Do you see that and do you recognize it?

A. Yes, sir. This was a letter I wrote to Dr.—

Q. Without going into detail, do you recognize the document, D-6?

A. Yes, sir.

MR. HAGEN: We would move for the admission of Defendants' 6.

THE COURT: It's in.

Q. (By Mr. Hagen) Would you just describe what it is for the jury.

A. Dr. Gilman was the dean of the medical school. This was a letter from me to Dr. Gilman requesting that we change the track for Dr. Nassar from the clinical scholar track to the clinician track.

Q. Okay. And if I read it correctly it says: He is an integral part of our HIV clinic, and his duties are entirely clinically based. It will be more appropriate to move him to clinician track, which better defines his efforts. This change will also enhance his opportunity for career enhancement.

Did I read that correctly?

A. Yes, sir.

Q. Are those words all true, and do you stand by them now?

A. Yes, sir.

Q. Did Dr. Nassar, at the time, indicate to you any objection at all about changing his track to clinician?

A. No, sir.

Q. Would you look at Defendants' Exhibit 5, please?

THE COURT: Five is not in.

MR. HAGEN: Your Honor, I think we will go ahead and skip 5.

THE COURT: Okay.

Q. (By Mr. Hagen) Would you look at Defense Exhibit 8, please?

THE COURT: Eight is in.

Q. (By Mr. Hagen) Do you recognize it, and what is it? Explain it to the jury.

A. Yes, sir. I do recognize it. It is a letter from Dr. Levine recommending to me that the department proceed to promote Dr. Nassar from assistant professor to associate professor.

Q. And is this about a three-page letter that you received from Dr. Levine on the topic?

A. Yes, sir.

Q. Okay. Was Dr. Levine's support, in the form of this letter and in any other way that she expressed it to you in regard to the promotion, was her support necessary to advance Dr. Nassar's candidacy and get him promoted?

A. Yes, sir.

Q. Why is that?

A. Well, as the leader of the program, she was really responsible for faculty evaluation and development and seeing where all the individuals fit in.

Q. If Dr. Levine had not submitted to you Defendants' Exhibit Number 8, this letter of recommendation for the promotion that he successfully sought, would he have — would he have been promoted?

MS. ALDOUS: Your Honor, I'm going to object. I think that would call for speculation.

THE COURT: Sustained. You have to lay a better foundation, and you would have to not guess.

MR. HAGEN: Sure.

Q. (By Mr. Hagen) In terms of the process that unfolds for promotion, who is it that initiates it and gets it to your attention?

A. The process is initiated by the division heads, in this case Dr. Levine for this division. It's then reviewed at the departmental level.

Q. And that's you?

A. And others. And a decision is made.

Q. If you do — in the absence of a recommendation for promotion by a division head, can you think of how many times you promoted somebody?

A. None in my memory in the last six years that I was in that role.

Q. And maybe better I should ask you, ultimately is it not the Promotion and Tenure Committee and the

Dean of the School of Medicine who makes the promotion?

MS. ALDOUS: Objection, leading.

THE COURT: I'm going to allow that.

A. Yes, sir.

Q. (By Mr. Hagen) Okay. So if Dr. Levine had not submitted to you Defendants' Exhibit 8, what is the likelihood that Dr. Nassar would have been promoted in 2006?

A. It is likely that it would not have happened or it would not have happened.

Q. Did you ever require or demand of Dr. Levine that she submit to you Defendants' Exhibit 8?

A. No, sir.

Q. Did Dr. Levine at any time ever try to withdraw this exhibit?

A. No, sir.

Q. Did Dr. Levine ever give it to you and then also make a phone call or whisper to you at any time, you know, I gave you a letter, but I really don't mean it?

A. No, sir.

Q. Did Dr. Levine, in any way, waiver in working to get Dr. Nassar promoted after she submitted this letter to you?

A. No, sir.

Q. Did Dr. Levine also give you other material in support of the promotion?

A. Yes, sir.

Q. Okay. What was the basic package of information she gave you to support the promotion?

A. There was his curriculum vitae, which you've seen. And so this letter was submitted to the Promotions Committee, which is charged with being a jury, much like yourselves, and the committee then evaluates. And she had communication requesting clarification on certain points. And so she went back and did extra work to really support those points in support of the promotion.

Q. Would you look at Defendants' Exhibit Number 10, please?

MR. HAGEN: This is admitted I believe already?

THE COURT: Defendants' 10 is in.

Q. (By Mr. Hagen) Would you tell the jury what Defendants' Exhibit Number 10 is and also when it is dated?

A. I do recognize it. It's a letter that I wrote dated December 30th, 2005, that was developed from Dr. Levine's letter that was the formal letter going to the Promotions and Tenure Committee recommending that he be promoted.

Q. So Defendants' Exhibit 8 is this document, is that right, from Dr. Levine to you, dated December 16, 2005; is that right?

A. Yes, sir.

Q. And then Defendants' Exhibit 10 is your letter to Dr. Gilman, who was the dean, do I understand that?

A. Yes, sir.

Q. Okay. It is at the very end of 2005; is that right?

A. Yes, sir.

Q. Okay. Go ahead, if you would, and read the first sentence of your letter to Dr. Gilman.

A. Dear Dr. Gilman, I am writing to recommend with enthusiasm the promotion of Naiel Nassar, M.D., from assistant professor to associate professor of internal medicine on the clinician track.

Q. Okay. Now, what are the next two and a half pages of your letter to Dr. Gilman intended to do?

A. To provide an appropriate background and framework supporting his credentials as a very well-trained and experienced doctor of infectious diseases and to support that he was a very valuable contributor to the clinical programs at Amelia Court.

Q. Did you testify — I'm sorry. Did Dr. Levine draft for you Defense Exhibit 10 or not?

A. This letter?

Q. Yes, your letter.

A. Yes, this was — I did use her letter as a base upon which to develop this letter.

Q. Would you look at the final paragraph of Defendants' Exhibit 10, please, which is your letter?

A. Okay.

Q. And is that your signature there, too?

A. Yes, sir.

Q. Okay. Would you read that to the jury?

A. In summary, we are delighted to have Dr. Nassar as a member of our faculty. He plays a very important role at UT Southwestern as an outstanding physician who is highly regarded by peers and students; an excellent teacher, both within and outside the University, and an effective administrator in the Parkland HIV/AIDS program and the Parkland pharmacy.

Moreover, he is one of those key factors responsible for the success of the HIV clinical and research programs. Based on these accomplishments, he has the enthusiastic support of the department for promotion to the rank of associate professor with great confidence that he will continue to be an important leader of these many efforts.

Q. Okay. And Dr. Fitz, did you ever back down from that written assessment?

A. No.

Q. Did Dr. Nassar get promoted?

A. Yes.

Q. In 2006?

A. He did.

* * *

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Q. Okay. Now, I believe — let me ask you, just in terms of — well, I'm sorry. Let's jump ahead now to Defendants' Exhibit 19.

THE COURT: That's in evidence.

MR. HAGEN: Yes.

Q. (By Mr. Hagen) Do you recognize Defendants' Exhibit Number 19?

A. Yes, sir.

Q. Okay. And would you tell the jury just first of all what the top page of Defendants' Exhibit 19 is?

A. This is an e-mail from Dr. Nassar to me and other individuals regarding his resignation letter.

Q. Okay. Did it come with an attachment or something enclosed it says?

A. It did come with an attachment.

Q. Okay. And this is the enclosure, this is the resignation letter?

A. Yes, sir.

Q. And it's dated on July 3; is that right?

A. Yes, sir.

Q. And it's this two-page —

MS. ALDOUS: I apologize. For clarification, I may just not have heard correctly. The first page — the e-mail is dated July 7th, is that what you said? I'm sorry. I thought he said September 1st.

MR. HAGEN: I did. I apologize.

THE COURT: I'm not sure.

MS. ALDOUS: Let me lodge my objection. This e-mail is not dated September 1, 2006, it's actually dated July 7th.

THE COURT: Mr. Hagen?

MR. HAGEN: I'm sorry if I misspoke on my dates. I apologize.

THE COURT: That's all right.

Q. (By Mr. Hagen) The top e-mail document that you are looking at that is Defendants' Number 19, could you please tell the jury when that e-mail is dated?

A. July 7th, 2006.

Q. Okay.

A. 4:58 p.m.

Q. Okay. And this is the item that came with an enclosure?

A. An attachment, yes.

Q. Okay. And what was the attachment?

A. The attachment is a letter from Dr. Nassar to me indicating that he was going to resign his position at UT Southwestern.

Q. Okay. Okay. Now, do you remember reading this letter later in — do you remember reading — receiving and reading this letter in July of 2006?

A. Yes, sir.

Q. What did you think of it?

A. Well, I was taken off guard, completely surprised, disappointed, and uncertain of what was behind all of this, because we had gone through this promotions process with the expectation that Dr. Nassar would be promoted and continuing on in Amelia Court for the job that he was now in.

Q. Okay. You testified — you can correct me if I'm wrong, but did you earlier testify that, at the end of April or early May, you met with Dr. Nassar and he talked to you about a champagne reception?

A. Yes, sir.

Q. Okay. Did you equate whatever that issue was with the level of concern that he expressed in this resignation letter about Dr. Levine?

A. I thought you were going to object.

MS. ALDOUS: I am going to object. Your Honor, I object, number one it's leading and, number two, it assumes facts not in evidence.

THE COURT: Rephrase the question.

MR. HAGEN: Sure.

Q. (By Mr. Hagen) Going back, I want to ask you, do you remember having a conversation in late April or early May with Dr. Nassar about a champagne reception that Beth Levine had hosted?

A. Yes, sir.

Q. My question for you is: Did you understand at that time that he had any of the feelings that were expressed later in this July 2006 communication?

MS. ALDOUS: Your Honor, leading.

THE COURT: I'm going to allow that, overruled.

A. No, I did not.

Q. (By Mr. Hagen) Did Dr. Nassar, in July — or rather, in late April or early May of 2006, say anything that resembled in your opinion the content of his resignation letter?

A. No, sir.

* * *

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REDIRECT EXAMINATION

BY MS. ALDOUS:

* * *

[167]

Q. Okay. And now that you brought that up, I want to talk to you for just a second about that. You have chosen to believe that Dr. Nassar was not discriminated against, correct?

A. Yes, ma'am.

Q. And you have told this jury that your blocking Dr. Nassar's employment at Parkland had nothing to do with his allegations of discrimination. That's what you're telling the jury, correct?

A. Yes, ma'am.

Q. All right. Now I want to ask you this, first of all. I thought I heard two different versions, and I want to make sure that I completely understand your testimony. Are you telling the jury that, in April of 2006, when you first learned that Dr. Nassar wanted to go to work at Parkland as opposed to being employed by UT Southwestern, the master affiliation agreement would not allow that to happen?

A. Yes, ma'am.

Q. Because I think yesterday, Doctor, you told me that you had — a physician had to be a faculty member at UT Southwestern in order to practice at

Parkland. That's what you've said, is it not, at Parkland Hospital, including Amelia Court.

A. Would you repeat that, please?

Q. You bet. I thought you told the jury yesterday that in order for a doctor such as Dr. Nassar to practice full time at Parkland, including Amelia Court, that doctor would have to be a faculty member at UT Southwestern. That's what you said yesterday.

A. That's my understanding, yes.

Q. But now today you're saying, well, no, the reason that couldn't happen, the reason I actually blocked Dr. Nassar — hang on just a second. We know what you just said you testified to yesterday is not true because Dr. Akbar is not a faculty member.

MR. HAGEN: Objection, argumentative.

THE COURT: Sustained.

Q. (By Ms. Aldous) Would you agree with me that it is not a fact that a physician practicing at Amelia Court in Parkland has to be a faculty member in order to do so, because Dr. Akbar actually was hired by Parkland and was not a faculty member at UT Southwestern.

A. I don't know anything about Dr. Akbar, how he spends his time. I just don't know.

Q. Okay. Now I thought you said here today that the reason you blocked Dr. Nassar's employment at Parkland was because he wanted to be the associate medical director of Amelia Court. Did I hear you correctly?

A. That factors into it, yes.

Q. Let me ask you this, then: What is it? Is it because he wanted to be the associate medical director at Amelia Court, is that why you blocked his appointment? Or is it because he had to be a faculty member at UT Southwestern in order to practice full time at Amelia Court? Which one is it, Doctor?

A. I think both are relevant.

Q. You think, or do you know?

A. I know that both are relevant. And in particular — I don't understand the distinction you're making perhaps.

Q. I believe you made it, sir, in all due respect. When Mr. Hagen was talking to you he said, now, why would it not work with the goals of UT Southwestern and Parkland to have Dr. Nassar just change his employment from UT Southwestern to be an employee of Parkland so he could still see his same patients? And I thought you said, well, the reason that would violate the agreement and the spirit of the agreement is because Dr. Nassar wanted to be the associate medical director of Amelia Court, and we want the UT Southwestern faculty members to hold that capacity so we can have continuity of care, we can train the doctors in training the residents and the fellows, did I hear you correctly?

A. Again, I would say both are true. It's my understanding that he needs to be a Southwestern faculty member and, if he were a leader in that role and not a faculty member, that would be complicated as well.

Q. Okay. So what you're telling the jury — I want to make sure.

A. Perhaps I'm not understanding you.

Q. We know you blocked his employment at Parkland Hospital; his being Dr. Nassar's?

A. Yes, ma'am, going back to April.

MS. ALDOUS: Objection, nonresponsive.

THE COURT: Sustained.

Q. (By Ms. Aldous) If you can answer my question, we have established and agreed that you blocked Dr. Nassar's employment at Parkland, correct?

A. Yes, ma'am.

Q. And you're telling the jury the reason you blocked his appointment as a staff physician at Parkland was because you knew — absolutely knew that, in order to practice at Parkland at Amelia Court, Dr. Nassar had to be a faculty member at UT Southwestern.

A. Yes, ma'am.

Q. Now, if, in fact, UT Southwestern has hired other physicians such as Dr. Akbar, such as Dr. Morris, if Parkland has hired those folks and they weren't faculty members and those folks have practiced at Amelia Court, you were wrong in your analysis were you not, sir?

A. Never was it presented to me.

MS. ALDOUS: Objection, nonresponsive.

THE COURT: Sustained.

Q. (By Ms. Aldous) If, in fact, it is true that Parkland Hospital District has hired at least two different physicians to practice at Amelia Court and if, in effect, it is true that those two — at least two physicians were not faculty members at UT Southwestern when Parkland hired them, you were wrong in your assessment as to why they could not hire Dr. Nassar, true?

A. No.

Q. So it's okay for those two, but it was wrong for him?

A. No, it doesn't mean the decision was wrong. It means I know nothing about the other two.

Q. What it means, sir, is you meant Dr. Nassar was not going to get hired at Parkland because he has raised serious allegations against your friend, Dr. Beth Levine, and you were not going to allow it to happen; that is true, is it not?

A. No, ma'am.

Q. Well, was part of the reason you decided to block Dr. Nassar's employment at Parkland because you didn't think he could be the associate medical director at Amelia Court, was that part of it, if he wasn't a faculty member at UT Southwestern?

A. That contributes, yes.

Q. Well, the fact of the matter is you have seen, through the e-mails, Dr. Nassar wasn't applying for associate medical director, he just wanted to be a staff physician. You know that, don't you?

A. I did not know that at the time. I did not know any of those employment efforts were taking place.

Q. As we sit here today, it is an undisputed fact, based upon the records, that Dr. Nassar — and based upon the testimony of Sylvia Moreno and Dr. Keiser that Dr. Nassar just wanted to practice medicine as an employee of Parkland and treat his patients at Amelia Court. He had no desire to be the associate medical director. We know that now, don't we?

A. That was never presented to me.

MS. ALDOUS: Objection, nonresponsive.

THE COURT: Sustained.

Q. (By Ms. Aldous) Could you answer my question please, sir?

A. Yes.

* * *

[185]

BETH LEVINE, M.D.,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. ALDOUS:

* * *

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Q. What is your area of specialty, Dr. Levine?

A. Infectious diseases.

Q. Are you board certified?

A. I was board certified in 1992.

Q. Are you currently board certified?

A. I am currently in the process of renewing that.

Q. My question is, are you currently, as you sit here at this very moment in your life, board certified in infectious disease?

A. No, I am not.

Q. And how many times have you been to Amelia Court HIV clinic?

A. It's hard to estimate; maybe 50 times.

Q. Have you ever treated any patients, hands-on treating patients at Amelia Court?

A. No, I have not.

Q. And you are a research scientist, are you not?

A. Yes, I am.

Q. That is, you don't deal with the hands-on patient care clinical practice of medicine, I think as it is determined, do you, ma'am?

A. Not presently.

Q. And now you have not, since you've been at UT Southwestern, have you?

A. That is not correct.

Q. So you have done some clinical care since you've been at UT Southwestern?

A. Yes.

Q. But you currently are not engaged in the clinical practice of medicine, is that a true statement?

A. That is a true statement.

* * *

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NAIEL NASSAR, M.D.,

having been previously sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LAUTEN:

* * *

[259]

Q. Who was the director of the HIV clinic during this time frame?

A. Phil Keiser.

Q. Did you work with Dr. Keiser, how long during this time period?

A. I was associate medical director. I was there every single day, unless on vacation or out town.

Q. Did you work with these other doctors in the clinic, and were you familiar with what kind of criticisms may have been lodged through them in light of the fact you were dealing with Dr. Keiser?

A. Yes.

Q. Okay. To your knowledge, did any of these other complaints that were being lodged by Dr. Levine, did they ever get lodged against any of the other doctors, if you know?

A. As far as I know —

MR. HAGEN: Objection in terms of the testimony that Dr. Levine —

THE COURT: Overruled. Overruled. Again, I don't need a speech, I just need a legal objection, and I don't think there is a basis; overruled. Go ahead.

Q. (By Mr. Lauten) To your knowledge, Dr. Nassar, did you feel like you were being treated differently than the other doctors in the HIV clinic?

A. Definitely.

Q. Okay. And what made you feel like you were being treated differently?

A. Because I have never heard any complaints about other people that I felt — or I knew they worked less than I did. I did the schedule in the clinic every month, and I knew everybody — where everybody was, and I knew I was working harder than anybody, and I never heard any complaint about the rest.

* * *

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Q. (By Mr. Lauten) Now I want to move on to the issue of you trying to become promoted.

A. Yes.

Q. Did Dr. Levine cause any problems for you in terms — in your mind, of you trying to become promoted?

A. From very early on, yes.

Q. And tell us what obstacles she created for you in trying to get promoted that you saw?

A. In March, I believe, of '04 or '05, I don't remember very well, I had a meeting, which is the annual meeting for evaluation. I told her that I have been at the assistant professor level for almost at that time maybe ten years, and it's time, I think, for my promotion.

And actually putting in mind when I was brought in, I was supposed to be brought in as an associate professor. Dr. Mumford, without my knowledge, changed it to an assistant professor. But anyway, it was acceptable to me because I really wanted to come back. We talked about this, and he said, when the time comes, just remind me. So I did remind her in October.

And I remember very well, because it was one day in October I was visiting my sister in North Carolina, and I got a phone call from Dr. Levine saying that probably she's not going to be able to put me for promotion this year.

Q. And what kind of problems did you encounter with trying to be promoted that you felt like Dr. Levine was creating for you? Tell us specifically what happened, and how long did that go on?

A. The first reason was that I am on the wrong track. And there was kind of — nobody was really clear which track I am on. Is it clinical scholar or clinical track? And she felt that my CV will not allow me to be promoted on the clinical scholar track, it will be most suited for the clinical track. And she suggested that I change my track, and, because of this, it will hold my promotion for a year.

Q. And in the six years that you had been employed at Southwestern at this particular time, did you ever have anyone tell you you were on the wrong track before?

A. Never.

Q. Had you ever had anyone say, you can't be promoted because you are on the wrong track, until Dr. Levine told you that?

A. Never.

Q. Do you know if anyone else similarly situated in the HIV clinic was told in this time period that they were on the wrong track?

A. I am not aware of a single one.

Q. When did you first come to the conclusion in your mind that you believed you were being discriminated against? When did you believe that first occurred?

A. Around this time.

Q. Okay. What led you to believe that?

A. It — just because of the excuse to me sounded very flimsy. My response to her at that point, I told her that I believed that my CV will allow me to be promoted in either track. And I remember exactly telling her, I have seen people who are promoted with worse CV than mine or better than mine on the same tracks, no problem.

Q. And did these criticisms that were lodged against you, did you feel like they had any merit?

A. No.

Q. Did you feel like you could do anything to rectify or make these complaints go away?

A. I didn't know how or what to do. I tried to, you know, basically to stay in my corner, which is Amelia Court, and do my job and that's it.

Q. Did these complaints bother you?

A. Yes, they did.

Q. How did they bother you?

A. It's sort of invalidation to everything you have been doing for your whole life. You have been working hard, seeing a lot of patients, more than anybody else, and when time comes for kind of being promoted, you know, it's not taken into account.

MR. LAUTEN: Defendants' 6 is in evidence, is that correct, Your Honor?

THE COURT: Defendants' 6 is in evidence, yes.

Q. (By Mr. Lauten) Dr. Nassar, this — do you remember this October 2005 letter that was admitted, changing your track? Do you recall this?

A. I've seen it before.

Q. Whose signature it that?

A. It's not my signature.

Q. Is that a forgery?

A. It is.

Q. Where were you in October of 2005?

A. I was in Cairo, Egypt. I have my passport to prove it.

Q. Did I ask you to bring your passport to prove you were out of the country in October of 2005?

A. No, I did on my own.

Q. What does your passport show where you were actually located in October of 2005?

A. I was in Cairo, Egypt.

Q. Do you know who forged your name to this document?

A. I don't know. Egypt is a country when you enter it that stamps your passport with the time and date, and when you leave they stamp your time and date. And it's clear in these days, almost 20 days, I was not in the U.S.

Q. Was this a document that was created after you complained that, I've never heard about being accused of being on the wrong track before?

A. That's around the time.

Q. According to this document, you consented to this.

A. I did not.

Q. That is not your signature.

A. I would be willing to take a handwriting analysis.

Q. All right. When did you first have a conversation with anyone at UT Southwestern where you told them, I feel like I'm being either discriminated against, singled out or treated differently? When was the first conversation?

A. It was a little bit before this, I talked to Dr. Keiser, and I had multiple meetings with Dr. Fitz. I did not meet with him only once, I had multiple meetings with multiple complaints.

Q. Let's go to Dr. Fitz. When was the first time you told Dr. Fitz that you believed you were being discriminated against or harassed by Dr. Levine?

A. The first — no, this did not come until later on. The first time I was complaining about that people say that — or she's saying that I'm not working hard enough and I'm not billing enough —

Q. Let me interrupt you. Listen to my question. When did that first conversation occur with Dr. Fitz? When was it?

A. It was around the time of the promotion actually.

Q. When in 2005 or 2006 would that have been?

A. That's — I would say after I came from overseas, so it was in November.

Q. November of what year?

A. '05.

Q. In November of '05, what did you tell Dr. Fitz?

A. I was telling him that I felt the degree of scrutiny about my billing and how many patients I'm seeing far exceeds anybody else, especially after I submitted documentation not only to him, but to Dr. Keiser, Dr. Levine and Dr. Ross; specifically with Dr. Ross, because I was really worried about my place in Parkland.

Q. So as early as November of 2005 you had a conversation with Dr. Fitz?

A. Yes, sir.

Q. What did Dr. Fitz say in response?

A. I have to say, every time I met with Dr. Fitz, he was very kind, he would listen, but probably nothing much other than that.

Q. Did anything change after your November '05 meeting with Dr. Fitz?

A. No.

Q. Did you feel this hostility from Dr. Levine?

A. Yes, I did.

Q. When was the next time you had a conversation with Dr. Fitz where you relayed to him that you felt like you were being singled out or treated differently?

A. It was around the time of my review or contacting multiple people to get recommendations on me.

Q. And do you have — can you tell us a date whereabouts this next conversation would have occurred?

A. It was early '06. I don't recall the exact date, but it was early '06.

Q. Okay. How early in 2006, if you know? Would it have been before or after April?

A. No, before April. I mean this is January, maybe.

Q. Okay. And in January of '06, what did you tell Dr. Fitz about how you felt like you were being treated?

A. It actually was a very odd situation. I was sitting in the clinic, and on my right-hand side, Dr. Suzanne Wada, who was one of the physicians, an infectious disease doctor, she's still in Parkland, she was sitting to my right, and she got a phone call. And toward the end of the conversation, she's saying, yes, no, and giving some detail.

Toward the end of the conversation, she's saying to that person, this is highly inappropriate, and she hung up the phone. And then she turns to me and said, this was your reviewer from the Promotion Committee, and he's trying to get me to say bad things about you.

Q. What kind of questions were being asked about you?

A. It's the same thing about working, if I'm in the clinic, if I traveled too much, if I give too many talks and, you know, if I'm billing enough or not. And she couldn't tell these things, either.

Q. And in January of 2006, what did Dr. Fitz — what did you relay to Dr. Fitz about problems you were having with Dr. Levine?

A. I related to him that I felt like I am being scrutinized more than others. I know there was a conversation or an e-mail between Dr. Keiser and Dr. Levine.

MR. HAGEN: Object, hearsay.

THE COURT: Between Keiser and Levine?

MR. LAUTEN: He hasn't said any out-of-court statement. He's just relying on —

THE WITNESS: It's from the e-mail.

THE COURT: All right.

MR. HAGEN: Same objection.

THE COURT: I'm not sure of the context. Would you explain it?

Q. (By Mr. Lauten) Sure. Let me make my question more specific and try to really listen to my question, Dr. Nassar. You talked about this January 2006 conversation with Dr. Fitz.

A. Yes.

Q. And what did you tell him specifically about how you were being treated by Dr. Levine? You had already met with him before, right?

A. Right.

Q. What did you tell him in that meeting?

A. I told him that I am feeling more scrutinized than anybody else. And a lot of this scrutiny could have been stopped by her, but she elected not to.

Q. Did Dr. Fitz say he would do anything about it?

A. He said he would take care of it.

Q. Did he?

A. Not as far as I know.

Q. Did you hear Dr. Fitz testify, I didn't know anything about this until July 7, 2006? Do you recall that?

A. Yes, I did.

Q. How many meetings did you have with Dr. Fitz where you told him, I'm being treated differently by Dr. Levine, before April of 2006?

A. Four to five.

Q. So in April of 2006, when you saw that e-mail with Dr. Ross, where it says he doesn't support the idea —

A. Yes.

Q. — had you met several times with Dr. Fitz expressing dissatisfaction with your treatment by Dr. Levine?

A. Yes.

Q. Had you related to Dr. Fitz that you wanted to go work at Parkland?

A. Yes.

Q. Is that how Dr. Fitz would have known to even talk to Dr. Ross about you coming to Parkland in April of '06?

A. Yes.

Q. Did Dr. Fitz ever offer — or did he ever make good on remedying your allegation of discrimination in the workplace, or did it keep getting worse?

A. He would listen and be very kind and very receptive, but I'm not aware of anything being done.

Q. Okay. What about Dr. Levine, did you have any conversations with her about how you felt like you were being treated?

A. I did not have any conversation with her until the time she called me to tell me I was promoted.

Q. And what conversations did you have with her?

A. At that time?

Q. Yes, sir.

A. She called me to congratulate me for the promotion, and I listened and didn't say anything. And she kept repeating it, and she said, are you excited? And I said, no, I am not. I have patients, and I need to go and see them.

Q. How do you respond to UT Southwestern's position, hey, she promoted you? How do you respond to that?

A. My response is, she kept putting obstacles. The first one is she said, you are on the wrong track. After the wrong track, they made an allegation — actually, at that time I left to Egypt. My dad was sick, and I went to see him, and they alleged that I took time off without having any time off.

THE COURT: Excuse me.

MR. HAGEN: Objection. I think this gets into a limine item.

THE COURT: The — I would like to specify who "they" is with the "they alleged" and I will listen.

THE WITNESS: I will be willing to give names.

MR. LAUTEN: I'm confused, Judge. I'm sorry. I guess it's late in the day.

THE COURT: Mr. Hagen thinks this is going to get into some kind of limine item. I don't know about that. My question was he said, "they alleged," and I don't think that's clear enough, so I would like to have that cleared up. I don't know about the limine item.

MR. LAUTEN: I have already forgotten the question, to tell you the truth. I'm at a loss as to where we were.

THE COURT: It has to do with complaints — his testimony had do with complaints.

MR. LAUTEN: Oh, yeah. Okay. Let me go back.

Q. (By Mr. Lauten) The question on the table, Dr. Nassar, is, how do you respond to UT Southwestern's position that Dr. Levine promoted you?

A. Okay. As I said, the first thing was the — now you made me confused. We talked about the wrong track. The second time is taking time without leave, buying a one-way ticket to Egypt without telling them when I'm coming back. And this was the infectious disease staff in the office, in the division. And Merrie Arnspiger, she's the — I think the manager of the Department of Medicine, I got very angry e-mails that I left without taking leave and bought one-way ticket.

And I remember I wrote back saying, no Middle Easterner in their right mind would fly overseas on a one-way ticket. I have to come back. So that was the other — they said they could not promote me because

I am not there for the promotion. I don't know what they needed from me.

The other thing, she refused to write my letter. And when she was pressed on it, I know that Dr. Keiser wrote the letter for her, because she's not going to do it unless Phil will do it.

Q. Did you feel like you were being treated differently by her?

A. Yes.

Q. And did you enjoy being a doctor at UT Southwestern?

A. Honestly, no.

Q. Before this — before the incident with Dr. Levine, were you happy being there?

A. Overall, yes, I was happy.

Q. And explain to the jury a little bit about what kind of caliber institution that is for a person like you that's pursuing being a professor in an academic institution, was that important to you?

A. It's very important. It's one of the best medical schools in the country, maybe in the world.

Q. And when did you make the decision that you felt like you needed to go to Parkland, and how did you make that decision?

A. That was around early 2006.

Q. Okay. Why did you make the decision to try to seek a job at Parkland if there was a chance you could still be promoted at UT Southwestern? Why did you do that?

A. Because I would be doing exactly the same job across the street in Parkland with nobody to bother me or harass me.

Q. Okay. Did you pursue the Parkland job to escape Dr. Levine?

A. Yes.

Q. Did you pursue the Parkland job for any other reason other than to get rid of Dr. Levine?

A. That's the most, the biggest one.

Q. And when you — if you had gotten the job at Parkland, would you have lost the faculty appointment that you had at Southwestern?

A. Probably.

Q. What job were you applying for at Parkland?

A. I applied for a staff physician job.

Q. How did you apply for it?

A. I went to HR, and I filled out the handwritten employment form, application for employment.

Q. And when you were pursuing employment at Parkland, during what time period would this have been in 2006?

A. This is going on from early 2006, all the way to the time I left.

Q. Okay. Who did you negotiate with at Parkland for your salary at that place?

A. At that time, it was mainly Henrietta Morgan.

Q. Okay.

A. And Sylvia Moreno.

Q. Did you receive a verbal offer to come work at Parkland?

A. Yes, I did.

Q. Who made that verbal offer to you?

A. Multiple people, from Sylvia to Henrietta Morgan to Phil Keiser to Dr. Ross.

Q. Did anyone ever tell you, Dr. Nassar, we can't hire you because of an agreement?

A. No.

Q. Did anyone ever tell you that some amorphous 1979 agreement would preclude you from working at Parkland?

A. Let me take that back. About the agreement, that was in April, I was told that we cannot hire you there because of the agreement. But after that, it was not an issue.

Q. Okay. After this — I know what e-mail you are referring to. After that one incident, did you continue to negotiate with Parkland as if it was a nonissue?

A. Yes.

Q. After that one e-mail, did anyone from Parkland ever say, but the contingency is that agreement?

A. Actually, they were far more receptive than before.

Q. Did you have a start date to work at Parkland?

A. I believe it was the 7th of July, 7th or 10th, somewhere around there.

Q. Had you finished the paperwork at Parkland?

A. It was done.

Q. Did you cooperate with their request for information?

A. Yes, I did.

Q. Did you respond to Ms. Moreno's questions about what you needed to do to become an employee?

A. Yes.

Q. As far as you knew, had all the details been completed except for the offer letter being signed?

A. Yes.

Q. Would you have quit, even in light of what Dr. Levine had put you through, would you quit if you didn't think you had a job at Parkland?

A. Yes.

Q. Because it was that bad?

A. Yes, I would.

Q. Okay. Did you think you had a job — when you wrote — well, we will get to it tomorrow. When you wrote your July 3rd, 2006, resignation letter, did you think you had a start date and an offer in the same job?

A. I was told, you will have a letter of employment on the 3rd. The 3rd is the date I wrote my resignation, because I was really just fed up.

Q. The same day that you wrote this letter to Dr. Fitz is the same day that unsigned offer letter is written?

A. Correct.

* * *

JURY TRIAL EXCERPTS

MAY 20, 2010

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NAIEL NASSAR, MD, *Plaintiff,* v. UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, PARKLAND HEALTH & HOSPITAL SYSTEM, BETH LEVINE, M.D., AND J. GREGORY FITZ, M.D. *Defendants.*	§ § § § § § § § § § § § §	Civil Action No. 3:08-CV-1337-B

JURY TRIAL

May 20, 2010

Before: The Honorable Jane J. Boyle
United States District Judge

CERTIFIED TRANSCRIPTION

I, Shawnie Archuleta, CCR/CRR, certify that the foregoing is a transcript from the record of the proceedings in the foregoing entitled matter.

/s/

July 30, 2010

* * *

[11]

NAIEL NASSAR, M.D.,

having been previously sworn, testified as follows:

CONTINUED CROSS-EXAMINATION

BY MR. HAGEN:

* * *

[40]

Q. Look at the Defendants' 56. Are you there?

A. Not yet.

Q. I'm sorry.

A. Yes, sir.

MR. HAGEN: Okay. Defendants' 56 is admitted, Your Honor?

THE COURT: Yes, it is.

Q. (By Mr. Hagen) This is what the jury has already seen that indicates that, by the time of that meeting that you put into your charge of discrimination occurred April 27 of 2006, this is the e-mail that shows that Dr. Fitz had already objected to your going to Parkland, correct?

A. Correct.

Q. And your charge of discrimination here, sworn under the penalty of perjury, makes the case that it is in retaliation for the complaint that you say that

you made April 27 of 2006 to Dr. Fitz that made him say no to this Parkland job, correct?

A. Yes, sir.

Q. So — by the way — so, by the way, Dr. Fitz had already taken a position and objection to your going to Parkland before your April 26 complaining to him, if at all, about Dr. Levine, correct?

A. Can you repeat that, please?

Q. Dr. Fitz, we know from these e-mails, had already taken a position objecting to your desiring to work at Parkland even before this complaining to him about supposedly Dr. Levine's conduct.

A. I do not recall the timing. I believe it's before and after.

Q. Well, it's right there in the e-mails, is it not?

A. Correct.

Q. Okay, and in your own charge of discrimination filed under the penalty of perjury, correct?

A. Correct.

Q. And that's the one you stand by today, correct?

A. Yes, I do.

Q. Okay. And looking at this Defendants' Exhibit 56, it has some handwritten notes there. Do you see that?

A. Yes, sir.

Q. Are those your handwritten notes?

A. Yes, sir.

Q. Okay. Are those handwritten notes — tell the jury, I'm sorry, if you would, first, just read what your handwritten notes on there are?

A. This is Dr. Ross' response to my e-mail, telling him I have an upcoming meeting with Dr. Fitz and asking him about any information.

Q. And you initialed it?

A. Yes.

Q. Okay. And who did you want to have read those handwritten notes?

A. I honestly don't remember.

Q. Didn't you end up directing a lot of your e-mails to Dawn Lewis?

A. After — I don't understand.

Q. Sure. You wrote this e-mail, and you sent it to Dawn Lewis at the EEOC, did you not?

A. She wanted copies of any e-mails I might have had, yes.

Q. So you not only made a copy, but you also did a little advocacy on that e-mail and presented it to Dawn Lewis, correct?

A I don't remember who it went to.

Q. Okay. Well, I think you already said she wanted copies of everything you had, right?

A. Probably. I said, yeah, that's true.

Q. And in fact, you got this out of your own personal e-mail account. It says Yahoo at the top, right?

A. Yes.

* * *

[57]

Q. Then you went to the Middle East and worked in a hospital from Saudi Arabia from July of '01 until November of '01?

A. Yes, sir.

Q. And then the University of Texas Southwestern Medical Center in Dallas hired you in November of 2001, where you worked up until August of 2006, correct?

A. You are correct.

Q. And then you made another move in September of 2006 to California.

A. Yes.

* * *

[79]

Q. All right. Now, in March of 2005, you underwent your very first performance evaluation by Dr. Levine, did you not?

A. I believe so.

Q. Do you remember how she assessed your performance as a physician in the Division of Infectious Diseases?

A. Yes, I do.

Q. How did she assess your performance?

A. Excellent.

Q. And again, that was the highest possible rating she could have given you; isn't that right?

A. I believe so.

Q. Do you remember if she contributed any comments about your performance in particular?

A. Probably, but I don't really remember.

MR. HAGEN: May I approach the witness?

THE COURT: You may.

Q. (By Mr. Hagen) Would you turn to the last page of this document?

A. Yes, sir.

Q. And first, would you tell me if you recognize it and what is it?

A. The first page or the last page?

Q. The whole document.

A. Yeah, I do recognize it. It's the evaluation form — faculty review.

Q. And is this the one that Beth Levine created for you in March of 2005?

A. I believe so.

Q. That was within her first year as the head of the Division of Infectious Diseases, right?

A. Yes, sir.

Q. Okay. And does this document refresh your memory about what specific comments she contributed to you that accompanied the overall rating of Excellent?

A. Yes, it does.

Q. Okay. What do you remember about what she said in her written comments?

A. Can you repeat that?

Q. What do you now remember about her written comments?

A. I don't remember really any of this conversation. It was a standard one, so . . . nothing in specific.

Q. Well, let me ask you: Does that document refresh your recollection about what written comments Dr. Levine provided in your performance review in March of 2005 wherein she assessed your performance as excellent? Does it?

A. I know what the overall evaluation is. I cannot remember every detail of the words, but it sounds right.

Q. Okay. So what do you now remember about what sounds right?

A. I'm an excellent clinician, that I play an important role as the associate director of the HIV clinic.

Q. All right. Thank you. Would you look at Defendants' Exhibit Number 3?

A. Yes, sir.

Q. Do you recognize that document?

A. Yes, I do.

Q. What is it?

A. It's an e-mail from me to Beth.

Q. Okay.

MR. HAGEN: Move for the admission of Defendants' 3.

THE COURT: Defendants' 3? Any objection? You said Defendants' 3.

MR. HAGEN: Yes, Your Honor.

THE COURT: Any objection?

MR. LAUTEN: No, ma'am.

THE COURT: Defendants' 3 is admitted.

(Defendant's Exhibit 3 admitted into evidence.)

Q. (By Mr. Hagen) This is an e-mail you said you sent to Beth Levine in July of 2005; is that right?

A. Yes, sir.

Q. Did you meet about the performance review that she gave you that you just testified about to the jury in March of 2005?

A. Yes, sir.

Q. And tell me if I read this correctly in this e-mail that you sent to Dr. Levine in July of 2005: Beth, in our meeting in March, you mentioned something about my promotion.

Did I read that correctly?

A. Of course, sir.

Q. It goes on: I am in the clinical faculty series, and I have been at the assistant professor level since '94. Is this the time to put me up for such promotion? Please let me know what I need to do. Thank you. Correct?

A. Yes.

Q. And by the end of that year, 2005, she had already written her letter that the jury has seen after the September solicitations go out to put people up for promotion, correct?

A. Correct.

Q. Greg Fitz had written his letter in support of your promotion, as well, correct?

A. Correct.

Q. The package was submitted to the Promotion and Tenure Committee for its review, correct?

A. Correct.

Q. The Promotion and Tenure Committee had assigned someone to take a look at your candidacy based on their advocacy for you, correct?

A. Correct.

Q. And by March of 2006, you were announced for promotion effective in September of '2006, correct?

A. Correct.

Q. So the timing here is, Beth Levine arrives in July of 2004, correct?

A. Correct.

Q. And by July of 2006, less than two years later, you have been — and within two years, you have been announced for promotion to be effective in September of '2006, right?

A Yes.

* * *

[122]

KIMALA AKINWANDE,

having been first duly sworn, testified as follows:

* * *

DIRECT EXAMINATION

BY MR. HAGEN:

* * *

[123]

Q. Ms. Akinwande, can you please help the jury understand what Parkland Hospital campus is?

A. The campus pretty much consists of the hospital, itself, our Ambulatory Surgery Center, which is directly across the street, and our Ambulatory Care Clinic, which is like urgent care, which is off-site of our Emergency Department. So that's pretty much the campus itself.

Q. Does the hospital campus have — in the Parkland Hospital, have an extension called Amelia Court Clinic?

A. Yes, it does.

Q. Who hires the doctors that work at Parkland Hospital, including the Amelia Court Clinic?

A. The UT System.

Q. So you're saying that the University of Texas Southwestern Medical Center Dallas hires the doctors that work at the Parkland Hospital, including Amelia Court Clinic?

A. Yes.

Q. Can you help the jury understand what a COPC is as part of the Parkland Health and Hospital System?

A. Sure. COPC is the Community Oriented Primary Care Clinics. We have 11 clinics, facility-based clinics, and 11 youth and family-based clinics and one home, which is really an RV that actually goes to the sites and treats the homeless population.

The COPC clinics, themselves, are geographically located throughout Dallas County to serve Dallas County patients. They provide primary care for adult, pediatric, adolescent, HIV services, an array of services for our patients, as well as access to referrals back to the main campus if needed.

Q. Does Parkland hire doctors to work at COPCs?

A. Yes.

Q. Does — okay. Is Amelia Court Clinic a COPC?

A. No.

Q. So the University hires the doctors for Amelia Court Clinic, and Parkland Hospital hires them for the COPCs?

A. Yes.

MS. ALDOUS: Objection, leading.

THE COURT: Sustained. And if there's an objection, just don't answer the question until it's ruled on. Sustained. The jury is instructed to disregard that last answer.

Ask another question, please.

Q. (By Mr. Hagen) The question is: Who hires the doctors that work at COPCs?

A. Parkland. Parkland Hospital. We do, Parkland.

Q. Who hires the doctors who work at Parkland Hospital, including Amelia Court Clinic?

A. UT. UT Southwestern.

Q. How does the Parkland hiring process work for the COPCs that it staffs?

A. Pretty much our physician recruiter will receive what we call a request for personnel. And when she receives that, it has to be approved by not only the VP of that department, but also the financial operations person, that the funds are there to fund that position.

They will list the type of physician that they are looking for in terms of internist, pediatrics, or whatever. And then she will take the RFP and post it internally and externally. Dependent on if we already have candidates that are pipelined, we could probably go ahead and staff it then. But usually it's an internal and external posting that happens immediately.

We always post it internally, simply because we want to give internal candidates opportunity to apply for the jobs.

Q. Who is Sylvia Moreno?

A. Sylvia, I believe, is the Director of HIV Services at Parkland.

Q. Does she, from time to time, make requests of your office to find a doctor to serve patients at COPCs?

A. Yes.

Q. Where does she ask that those doctors go work?

A. Usually it's clear when we — once we start talking. But if we know that there is going to be a module, HIV services going to be opening at a certain COPC, say, Southeast, you know, whatever clinic we know that needs the service, the physician to treat the patients for that service area, is where we know they're going to go.

Q. If, in 2006, Ms. Moreno wanted to get Parkland to hire a doctor to be assigned to work at Amelia Court Clinic, assigned there to work, would that have been proper?

A. No.

Q. If, in 2006, she wanted to get Parkland to hire a doctor to be assigned to work at a COPC in the region, would that have been proper?

A. Yes; yes, absolutely.

Q. Let me represent to you, based on the testimony that's come in so far in this case, that Ms. Moreno tried to get Parkland Hospital to hire a doctor named Dr. Nassar who was a UT Southwestern doctor assigned to the Amelia Court Clinic to treat patients, and he happened to also be its associate medical director.

A. Okay.

Q. Let me also represent to you that the plan was to have him carry on his same duties at the Amelia Court Clinic, only as a Parkland Hospital employee. Has any — do you understand that?

A. Yes, I do.

Q. Has any such thing ever happened before, to your knowledge?

A. No.

Q. Has any such thing ever happened since then —

A. No.

Q. — to your knowledge?

A. No.

Q. And in the plaintiff's case, they have presented the names of four doctors who Parkland has hired to staff supposedly, according to their case, at Amelia Court Clinic. And may I list for you their names?

A. Sure.

Q. Dr. Laura Armas, Dr. Bernal, Dr. Deborah Morris-Harris, and Dr. Muhammad Akbar.

A. Okay.

Q. My first question for you, ma'am, is, first: Did Parkland hire each of these people as doctors?

A. Yes.

Q. Second: Did Parkland hire any one of these people to staff the Amelia Court Clinic?

A. No.

Q. Okay. What did Parkland hire these four doctors to do?

A. To work — to work in our COPC clinics treating HIV patients.

Q. How do you know that?

A. One, because I'm the director over the area. I actually went back and looked at their recruitment files that we maintain in our office, and the records that we have that were submitted to our HR Department, which is the hiring process part, all indicate that they were hired to work at COPCs.

* * *

[129]

CROSS-EXAMINATION

BY MS. ALDOUS:

* * *

[145]

Q. Now, Dr. Nassar's position that he had applied for eventually was filled, was it not?

A. Yes.

Q. And do you recall the name of the physician who filled his position?

A. I believe it was Deborah Morris-Harris.

Q. Dr. Deborah Morris-Harris was actually hired by Parkland, and she got the exact position that Dr. Nassar had previously wanted?

A. Yes.

Q. And Dr. Morris-Harris was never — or was, at the time she was hired by Parkland, not a faculty member at UT Southwestern, was she?

A. No.

Q. So Parkland hired a non-UT faculty Southwestern physician to fill the exact position that Dr. Nassar had wanted?

A. Yes.

MS. ALDOUS: That's all I have.

THE COURT: Redirect?

MR. HAGEN: Yes, Your Honor.

[146]

REDIRECT EXAMINATION

BY MR. HAGEN:

Q. Was — let's clarify. Was Dr. Morris-Harris hired to go to work at the Amelia Court Clinic by Parkland?

A. No.

Q. Okay. So what position are you referring to, when you say Ms. Deborah Morris-Harris, Dr. Deborah Morris-Harris, was hired into a slot created for Dr. Nassar? What are you referring to?

A. I'm referring to that she was offered a position to work within our COPC clinics, which are the off-site clinics.

Q. Was the position that Dr. Nassar — was the position that Dr. Nassar — okay. Was the position, the formal paperwork, the way it was presented by

Sylvia Moreno, was that stated to be a staff physician position for Parkland Hospital at a COPC?

MS. ALDOUS: Objection, leading.

THE COURT: Sustained.

Q. (By Mr. Hagen) Okay. Let me ask you, in terms of this Form 54-B that was created here by Sylvia Moreno, do you see that?

A. Yes.

Q. It seems to have her signature here, Sylvia Moreno, correct?

A. Yes.

Q. And this is the staff physician internist position?

A. Correct.

Q. Okay. If Ms. Moreno created and signed that form to get Dr. Nassar to work as a Parkland employee at Amelia Court Clinic, is that appropriate?

A. No.

Q. Why?

A. Well, first, it says the department is 4-800, which is not the Amelia Court call center.

Q. What is this form presenting itself to be hiring Dr. Nassar as?

A. As a physician working for our HIV Services, which are throughout the COPCs, and they would be covered by the Ryan White Grant, funding by the Ryan White Grant.

Q. Is there anything in this form that indicates or the posting that Ms. Moreno associated with this

form that indicates that this posting would fill a position at Amelia Court Clinic?

A. No.

Q. So Dr. Morris-Harris, when she applied and got the position that Dr. Nassar did not take, where did she go to work?

A. I believe she went to Southeast, but I'm not certain. I know she went to one of the COPC clinics.

MR. HAGEN: No other questions. Pass the witness.

MS. ALDOUS: Very briefly, Your Honor.

THE COURT: I will let you.

[148]

RECROSS-EXAMINATION

BY MS. ALDOUS:

Q. How many actual AIDS clinics does Parkland have — not talking about COPCs that maybe treat HIV patients — but HIV/AIDS clinics.

A. That Parkland has? I believe one, just the Amelia Court.

Q. So although the HIV physicians may treat AIDS patients at the COPC clinics, Parkland only has one AIDS clinic that is for HIV/AIDS patients, correct?

A. Correct; one facility, yes.

Q. One clinic, and that is Amelia Court, true?

A. Uh-huh. Yes.

Q. Okay.

MS. ALDOUS: May I approach the elmo, Your Honor?

THE COURT: You may.

Q. (By Ms. Aldous) And Plaintiff's Exhibit 16 that we looked at, the offer here specifically says: I would like to formally offer you a position as Staff Physician Internist at HIV Services AIDS Clinic, does it not?

A. Correct, it does.

Q. And so that means Amelia Court.

A. It doesn't say that. But — she could be implying that, but that's not what it says.

Q. Well, I thought you told me that the only AIDS clinic Parkland has is Amelia Court.

A. It is.

Q. Okay. So it would stand to reason —

A. The only facility — one could say that HIV Services that are at any of our COPC clinics, for instance, Southeast, they consider their HIV Services a clinic. They have a model in the facility itself that is a clinic itself. So that's why I was talking facility.

Q. I understand. But there's only one AIDS clinic. And Exhibit Number 16 says Dr. Nassar is being offered the job at the AIDS clinic, does it not?

A. Yes. And Parkland Health and Hospital System, which is, again, the COPC part of it.

Q. And do you know who Tisa Jordan is?

A. Tisa, yes.

Q. Who is Tisa?

A. Tisa formerly worked for Parkland as an employee relations specialist, I believe.

Q. And Tisa Jordan would obviously be someone to know who had filled the position that Dr. Nassar had applied for, would she not?

A. Not obviously; if she were to ask us.

MS. ALDOUS: May I approach the witness, Your Honor?

THE COURT: You may.

Q. (By Ms. Aldous) I'm going to show you what has been marked as Plaintiff's Exhibit Number 30 and ask you if that appears to be an e-mail from Tisa Jordan.

A. Correct.

THE COURT: Excuse me.

MR. HAGEN: I'm sorry. You're authenticating this letter. Thanks.

MS. ALDOUS: I was giving it a whirl, at least.

THE COURT: Go ahead.

Q. (By Ms. Aldous) And this Exhibit Number 30 is an e-mail that Tisa Jordan evidently sent on her parknet e-mail account, is it not?

A. Correct.

Q. And it would be the practice to have it and custom of employees at Parkland to respond about Parkland business on the Parkland e-mail system, would it not?

A. Yes.

Q. Okay. And this obviously is something that was done by Ms. Jordan in the regular course of her business because it comes from the parknet.pmh.org, does it not?

A. Correct.

MS. ALDOUS: At this time we would offer Plaintiff's Exhibit 30.

THE COURT: Mr. Hagen?

MR. HAGEN: No objection.

THE COURT: Plaintiff's 30 is admitted. For clarification, for future purposes, I don't think it's a business record. It's admitted.

(Plaintiff's Exhibit 30 admitted into evidence.)

Q. (By Ms. Aldous) And if we look at Exhibit Number 30, it is an e-mail from Tisa Jordan to dawn.lewis@eeoc dated April 4, 2007, is it not?

A. Correct.

Q. And it says: Dawn, in reference to our telephone conversation today, the position that Dr. Nassar applied for his been filled. The position was filled on January 3rd, 2007, by Dr. Deborah Morris-Harris. The position was filled by an internal candidate. The requested information regarding the person selected is below. Should you have any additional questions, feel free to contact me.

Do you see that?

A. Yes.

Q. Okay. So you have no reason to believe that Tisa Jordan was saying anything but the truth when she

said that Dr. Morris-Harris filled the position that Dr. Nassar had applied for.

A. True.

Q. And we have already established that Dr. Morris-Harris was not on the faculty at UT Southwestern when she filled this position, correct?

A. Correct.

MS. ALDOUS: That's all I have. Thank you, Your Honor.

MR. HAGEN: I must follow up, Your Honor.

THE COURT: All right. And that will be it.

[153]

RE-REDIRECT EXAMINATION

BY MR. HAGEN:

Q. Once again, the position that Ms. Deborah Morris-Harris — the posting that she filled was for a posting that said that the doctor would work where?

MS. ALDOUS: Objection, leading.

THE COURT: Sustained; rephrase, please.

MR. HAGEN: Sure.

Q. (By Mr. Hagen) This is, again, 54-B or A. This staff physician internist indicates that the person would fill what sort of a position?

A. HIV Services funded by Ryan White, A Staff Physician Internist.

Q. Okay. Would that — would a COPC be or not be a place where a Parkland physician would work?

MS. ALDOUS: Objection, leading.

THE COURT: Overruled on that.

A. Yes. The department —

THE COURT: Which one would it be?

Q. (By Mr. Hagen) Would a COPC be where this job description — a doctor employed by Parkland under this job description would work?

A. Yes, it would be.

Q. So you were shown Plaintiff's Exhibit 16. And this is a letter that indicates that — somebody wrote: would like to formally offer you a position as staff physician and internist at HIV Services AIDS Clinic, Ryan White Grant, within Parkland Health and Hospital System.

Do you see that?

A. Yes.

Q. Now, I think your testimony was that Amelia Court Clinic is the primary — or the clinic within the Parkland Hospital System where this work is — AIDS work is done?

MS. ALDOUS: Objection, leading.

THE COURT: Sustained; rephrase, please.

Q. (By Mr. Hagen) Well, what is the — this — this letter, does it imply to you that it's discussing the Amelia Court Clinic?

A. No.

Q. Okay. Does it imply to you that it's working, first of all, I guess, out of some AIDS clinic under the Ryan White?

A. Yes.

Q. And was there a suggestion, then, that the only — or that the — well, let me ask you this: Was there a suggestion by the plaintiff's counsel that this was intended to get Dr. Nassar hired into the Amelia Court Clinic?

MS. ALDOUS: That's argumentative.

THE COURT: Sustained; rephrase.

Q. (By Mr. Hagen) Let me ask you: Here's the key thing —

MS. ALDOUS: I'm going to object to the sidebar.

THE COURT: He's just trying to get to the point. Let's do that.

MR. HAGEN: I will.

Q. (By Mr. Hagen) What is missing from Plaintiff's Exhibit 16 in order to conclude some sort of a hire of Dr. Nassar at the Amelia Court Clinic in the fashion that he wanted to accomplish? What is missing?

A. That it does not say Amelia Court Clinic.

Q. Is it missing anyone's signature?

MS. ALDOUS: Your Honor, I'm —

THE COURT: Sustained, sustained. I think we're going to go ahead and stop for the day because we need to get this back and forth resolved, and we're just spending too much time on it.

* * *

JURY TRIAL EXCERPTS

MAY 21, 2010

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NAIEL NASSAR, MD, *Plaintiff,* v. UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, PARKLAND HEALTH & HOSPITAL SYSTEM, BETH LEVINE, M.D., AND J. GREGORY FITZ, M.D. *Defendants.*	§ § § § § § § § § § § § § §	Civil Action No. 3:08-CV-1337-B

JURY TRIAL

May 21, 2010

Before: The Honorable Jane J. Boyle
United States District Judge

CERTIFIED TRANSCRIPTION

I, Shawnie Archuleta, CCR/CRR, certify that the foregoing is a transcript from the record of the proceedings in the foregoing entitled matter.

/s/

July 30, 2010

* * *

[7]

NAIEL NASSAR, M.D.,

having been previously sworn, testified as follows:

* * *

[17]

CROSS-EXAMINATION

BY MS. ALDOUS:

* * *

[18]

Q. What, if anything, did Dr. Levine's conduct have to do with you looking for a job in California?

A. Just the continuous harassment. I was just tired of it.

MS. ALDOUS: May I approach the elmo, Your Honor?

THE COURT: You may.

Q. (By Ms. Aldous) Dr. Nassar, I will show you — and the jury has seen it several times — but just real quickly, Mr. Hagen just asked you about suggestions that were made yesterday, I assume by me, that the job offer Parkland gave you, if it was actually for the Amelia Court or the AIDS Clinic. Do you recall him just asking you about that?

A. Yes, ma'am.

Q. Okay. First of all, I want you to tell the jury, Dr. Nassar, was there ever any doubt in your mind as to whether the job offer that you were talking about with Parkland was for you to work at the AIDS Clinic at Amelia Court?

A. I have absolutely no doubt in my mind. That's what we have been talking about since even before April, so yes.

Q. All right. Did you have any interest in going to work at the other COPC clinics treating AIDS patients?

A. I never expressed any interest in this.

Q. Why would you not have any interest in going to work for the COPC clinics, the outlying clinics, Dr. Nassar?

A. Because it means I would be practicing general medicine with a smidgen of HIV, and I thought that my training is much better suited to take care of HIV patients.

Q. Dr. Nassar, will you tell the jury, during the course of your professional career, since you became board certified in infectious disease, what have you given your professional life and heart to?

A. 100 percent care for HIV patients.

Q. Do you feel passionate about that?

A. Yes, I do.

Q. Would you tell the jury why you feel passionate about giving your professional life to caring for HIV/AIDS patients?

A. For a very long time, HIV patients did not have anybody to take care of them or advocate for them. They did not have very good physicians to care for them. And for a long time, we used non-trained physicians to take care of them. And there is a lot of data and literature to show that HIV patients do much better if they are cared for by somebody who is experienced in HIV care, not otherwise.

Q. Now, if we look at Plaintiff's Exhibit Number 16, you've heard the testimony in this courtroom saying that Parkland never hires doctors or never would hire a doctor to work at Amelia Court. You've heard that, have you not?

A. Yes, ma'am.

Q. Does your letter specifically say, Staff Physician Internist at HIV Services-AIDS Clinic, Ryan White Grant?

A. Yes, ma'am.

Q. And Dr. Nassar, after you heard the testimony by one of the Parkland employees yesterday about they would never hire you for the Amelia Court Clinic, did you do anything?

A. I looked up what Parkland has on the Internet as a description of the HIV Services.

Q. How did you feel when you heard the testimony that Parkland never offered you a job at the HIV clinic?

A. I had chest pains. I was upset.

Q. Why were you upset, Dr. Nassar?

A. Because it was a misrepresentation of what I was offered.

MS. ALDOUS: May I approach the witness?

THE COURT: You may.

Q. (By Ms. Aldous) Dr. Nassar, I'm going to hand you what I have marked as Plaintiff's Exhibit Number 80. Is that something that you found on the Internet last night on Parkland's own website?

A. Um-hum.

MR. HAGEN: Your Honor, I'm going to object as to outside the scope.

THE COURT: First of all, if it's a rebuttal exhibit and he hasn't seen it, he needs to see it first.

MS. ALDOUS: I'm sorry, Your Honor.

MR. HAGEN: This is — okay. Being treated as a rebuttal witness now. Okay.

THE COURT: As long as you've seen it and he's a pure rebuttal exhibit, I'm fine with it so far. Go ahead.

Q. (By Ms. Aldous) Is Exhibit Number 80 something that you looked up last night after you heard Ms. Akinwande's testimony here in the courtroom?

A. Yes, ma'am.

MS. ALDOUS: Your Honor, we would offer Exhibit Number 80. May I approach the Court with a copy?

THE COURT: That's fine, if you will hand it over to me, please.

MR. HAGEN: Just object as hearsay. This is the first time I've seen this.

THE COURT: Let's get the foundation first. I want to make sure I'm clear on where this was found and it is authentic to the extent it can be authenticated by this witness.

MS. ALDOUS: Absolutely.

Q. (By Ms. Aldous) Dr. Nassar, did you get on the Internet last night?

A. Yes, ma'am.

Q. And tell the jury, if you would, what you searched for on the Internet?

A. I looked for HIV Services in the Dallas area, and that led me to the Parkland site where you can look up what kind of service is offered, and it's a pull-down menu. So I pulled down HIV and AIDS centers that are sponsored by Parkland in the whole Dallas area.

Q. And at the top of Exhibit Number 80, does it have http/www.parklandhospital.com?

A. Yes, ma'am.

Q. So was Exhibit Number 80 actually obtained by you from the Parkland Internet website?

A. Yes, ma'am.

Q. And is that an accurate reflection of exactly what you found on the Parkland website?

A. Yes, ma'am.

MS. ALDOUS: Your Honor, we would offer Exhibit Number 80. It's admission of a party-opponent, as well.

THE COURT: Mr. Hagen?

MR. HAGEN: Your Honor, the objection is hearsay and authentication.

THE COURT: I agree it comes in under 801 as a party-opponent. We have addressed the issue of Parkland v. UT Southwestern. But for the same reasons earlier I admitted it under those circumstances, I admit it now. That would be Plaintiff's Exhibit —

MS. ALDOUS: 80.

THE COURT: — is admitted.

(Plaintiff's Exhibit 80 admitted into evidence.)

MS. ALDOUS: May I approach the witness, Your Honor?

Q. (By Ms. Aldous) I want to compare what Parkland's own website says about their AIDS clinic to the exact language on Plaintiff's Exhibit Number 16, where it says, Staff Physician Internist at HIV Services-AIDS Clinic. Do you see that?

A. Yes, ma'am.

Q. Now, if we look at Parkland's website, Exhibit Number 80, and it says, Outpatient, HIV/AIDS Support Centers, do you see that?

A. Yes, ma'am.

Q. And it has HIV/AIDS Clinic. Did I read that?

A. Correct.

Q. And that's the same word that was in your job offer from Parkland, correct?

A. Yes, ma'am.

MR. HAGEN: Object on leading grounds, Your Honor.

THE COURT: Sustained; rephrase.

Q. (By Ms. Aldous) What, if anything, did your job offer say about clinic?

A. It's exactly the same wording.

Q. All right. And if we look at the HIV-AIDS clinic on Exhibit Number 80, is the address 1936 Amelia Court?

A. Yes, ma'am.

Q. And is that the exact same address that you had been working at since 2001 caring for HIV-AIDS patients under the auspices of Parkland?

A. Yes, ma'am.

Q. And now, if we see these other clinics, do you see it says, Bluitt Flowers Health Center, Southeast Dallas Health Center, Vickery Health Center. Do you see that?

A. Yes, ma'am.

Q. Do you understand that's what we have learned now are the COPC clinics?

A. Yes, ma'am.

Q. Tell the jury, Dr. Nassar, did you ever apply for a job at the Bluitt Flowers Health Center, the

Southeast Dallas Health Center, or the Vickery Health Center?

A. I never applied there. I don't even know where they are.

Q. Now Dr. Nassar, Mr. Hagen asked you some questions just a few minutes ago about why Dr. Fitz did what he did to block your employment at Parkland. Do you recall those questions and that testimony?

A. Yes, ma'am.

Q. I want you to tell the jury, do you believe that Dr. Fitz, on behalf of UT Southwestern, he retaliated against you because you had brought a harassment and discrimination case against Dr. Levine?

A. Absolutely, yes.

MS. ALDOUS: May I approach the witness?

THE COURT: You may.

Q. (By Ms. Aldous) Dr. Nassar, I'm going to hand you what has been marked as Plaintiff's Exhibit Number 26 and ask you, sir: Does that appear to be something that was drafted by someone at Parkland Health and Hospital System? Is it on Parkland letterhead?

A. Yes, ma'am.

Q. Okay. And if you look at the last page, is it signed by Tisa Jordan, Employee Relations Specialist Number 3?

A. Yes, ma'am.

MS. ALDOUS: May I approach the elmo, Your Honor?

THE COURT: Go ahead.

Q. (By Ms. Aldous) If we look at Plaintiff's Exhibit 30.

MR. HAGEN: Your Honor, that's not in evidence.

MS. ALDOUS: I am not putting that up.

Q. (By Ms. Aldous) If we look at Plaintiff's Exhibit Number 30, which has already been admitted into evidence, we see that Tisa Jordan is the exact same person who told the EEOC investigator that your position, the position you had applied for, had been filled on January 3rd, 2007, by Dr. Deborah Morris-Harris, correct?

A. Correct.

Q. And so Tisa Jordan, who said Dr. Deborah Morris-Harris is the person who had gotten the job that you had originally been offered, is the same person that said — that drafted Exhibit Number 26 —

A. Yes, ma'am.

Q. — if you look at the names.

MS. ALDOUS: All right, Your Honor. At this point in time, we would offer Plaintiff's Exhibit Number 26. It's also admission of a party-opponent.

THE COURT: Is this — one moment. Before you say anything, let me take a look at it. Plaintiff's 26. All right. And your position?

MR. HAGEN: Couple of things. Objection, hearsay; relevance; 403. It's also subject to the motion in limine on all these EEOC matters.

THE COURT: All right. This is the — how many page document — how many pages is the whole thing? That's one, two, three, four, and five. I think it is an admission by a party-opponent. I know that yesterday some of the — at least the complaint, as I recall, filed by Dr. Nassar against Parkland, was discussed and perhaps even admitted by the defense side of this, so I think it's been opened up. I do think that it's part and parcel of the case in any event for the reasons I have already stated, and I think it's an admission of party-opponent. So Plaintiff's Exhibit 26 is admitted.

(Plaintiff's Exhibit 26 admitted into evidence.)

MS. ALDOUS: May I approach the witness, Your Honor?

THE COURT: You may.

Q. (By Ms. Aldous) Dr. Nassar, I want to show you exactly the portion of this Exhibit Number 26 and ask you to read along with me. Do you see, under this EEOC response that Parkland filed, it has an issue there that says, Retaliation. Do you see that?

A. Yes, ma'am.

Q. Now, is it your allegation in this case that Dr. Fitz retaliated against you because you had filed a discrimination case against Dr. Levine?

A. I don't have any doubt in my mind, yes.

Q. All right. Now, if this says — you see the issue. Number one: List by name and position all officials of your organization who have been informed of or knew of all of the allegations of discrimination made by the charging party — and are you the charging party?

A. Yes, ma'am.

Q. — if any. For each person listed, state the date such notification was received, the nature of the notification, and the person's response to it. Submit all documents which state, describe, reference, or relate to the notification of the charging party's complaint.

Do you see that?

A. Yes, ma'am.

Q. Now, the answer that was given to the EEOC is Parkland's answer. It's on Parkland's letterhead, correct?

A. Correct.

Q. And it was by Tisa Jordan, who is the Employee Relations Specialist at Parkland, correct?

A. Yes, ma'am.

Q. Let's see what Ms. Jordan told the EEOC about Dr. Fitz's contact with Dr. Ross. Okay?

A. Yes, ma'am.

Q. The week of July 10th, now, would that have been seven days after the letter — you received a letter from Parkland on the job?

A. Correct.

Q. All right. The week of July 10th, 2006, Dr. Samuel Ross, Chief Medical Officer, contacted Dr. J. Gregory Fitz to discuss the claimant and his potential hire by Parkland Health and Hospital System. Do you see that?

A. Yes, ma'am.

Q. Now, during that time of July the 10th, Dr. Nassar, were you waiting to hear back to make sure that you actually got the job?

A. Yes, ma'am.

Q. That it was confirmed?

A. Yes, ma'am.

Q. If you had actually gotten the job to go to work at Amelia Court as a Parkland employee, can you tell the jury, is there any doubt in your mind whether you would have taken that job?

MR. HAGEN: Objection.

THE COURT: Sustained; rephrase.

Q. (By Ms. Aldous) If you had received the job at Parkland.

A. I would have stayed, absolutely.

Q. Now, it says: Dr. Fitz informed Dr. Ross that the charging party — you — made allegations against Dr. Levine and asked that Dr. Ross give him an opportunity to look into the matter.

Did I read that correctly?

A. Yes, ma'am.

Q. Dr. Ross was not able to obtain the needed agreement from UT Southwestern to hire the charging party prior to being notified that the charging party accepted another position in California.

A. Yes, ma'am. May I add one thing?

Q. You probably can't.

A. Okay.

Q. I wish I knew what you wanted to add so I could ask you a question.

A. I will keep my lips tight.

THE COURT: With this pause, it's probably a good time to remind the ladies and gentlemen of the jury that these, of course, are findings and discussions of an agency with Parkland, and you're not bound by them as you are with anything in the case. You decide how much you want to believe and what credibility and weight you want to give each of these types of documents as with all the other evidence and witnesses.

Q. (By Ms. Aldous) Can you tell the jury, in your mind, Dr. Nassar, if Dr. Fitz had already made it abundantly clear to Parkland in April 2006 that they couldn't hire you, why in the world on July 10th, 2006, would Dr. Fitz tell Dr. Ross, Dr. Nassar's made allegations against Dr. Levine, please let me look into that first?

A. I think he was mad at me and retaliated against me.

MS. ALDOUS: I pass the witness, Your Honor.

THE COURT: Mr. Hagen?

MR. HAGEN: Yes, ma'am.

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REDIRECT EXAMINATION

BY MR. HAGEN:

Q. First of all, let's see if we can try to bring some clarity to this website printout that you looked up last night. This is the document that's been entered into evidence as Plaintiff's 80 now; is that right?

A. Yes.

Q. Okay. It lists what physical facilities Parkland has or owns that treat HIV patients, right?

A. Yes.

Q. And in fact, Amelia Court is a physical plant that treats HIV/AIDS patients, correct?

A. The clinic does not treat people, physicians treat people.

Q. Thank you, Doctor. This document does not purport to say who is properly employed at each of these facilities, does it?

A. Apparently not.

Q. Okay. And in fact, apparently it's the case that we've heard testimony that Parkland Hospital is a facility, whether we like it or not, that has faculty employed by UT Southwestern Medical Center as the doctors who treat patients at that facility, correct?

A. I don't understand your question.

MR. HAGEN: Would you read it back?

MS. ALDOUS: Your Honor, if he doesn't understand it, reading back isn't going to help.

THE COURT: Let's try it that way. Ms. Archuleta will read it back.

(The record was read as requested.)

A. I still don't understand the question.

Q. (By Mr. Hagen) If I might shortcut that, Parkland Hospital and its physical plant, including Amelia Court Clinic, has staffing it physicians employed by UT Southwestern Medical Center at Dallas?

A. Yes.

Q. Okay. So that is, is it not, the legitimate reason why Dr. Fitz and Dr. Ross paused or, in the first place, Dr. Fitz objected to your taking a job at Amelia Court Clinic; isn't that right?

A. Absolutely not.

Q. Okay. And that's even, in spite of the documentation that you have seen, going back to April of 2006, that says well before your controversy about your resignation letter, that documentation says by Dr. Fitz, I object to this plan that Dr. Nassar has to change his employment from UT Southwestern to Parkland and remain working at Amelia Court Clinic carrying on his same duties there, correct?

A. You are talking about two separate events.

Q. Let me show you, again, Defendants' Exhibit Number 14. This is entered into evidence. It's dated April 27 of 2006. And does it not read: As per

discussion, it would be against our operating agreement with Parkland to have them employ faculty directly so we cannot go there, correct? He's referring to Parkland and to you, correct?

A. Correct.

Q. Okay. So his position on this matter, whether you think it's erroneous or not, is founded on this operating agreement as he understood it at the time; isn't that right?

THE COURT: Excuse me.

MS. ALDOUS: Object, asked and answered, number one; number two, speculation.

THE COURT: Overruled. Just don't guess on it.

A. I won't guess. I don't know.

Q. (By Mr. Hagen) Okay. But you would agree that this is months before your resignation letter and the claims that you made in it against Dr. Levine, correct?

A. Correct.

Q. And it is Dr. Levine's — the resignation letter and the claims that you made against Dr. Levine in that resignation letter that you say got you retaliated against by Dr. Fitz, correct?

A. Yes.

Q. Now, at the risk of further confusing things, I do want to ask you, are you making the claim that you did not charge Parkland Hospital with retaliation as a consequence of their denying you a COPC job, but

that you charged discrimination against them due to a denial of the job at Amelia Court Clinic?

THE COURT: One moment.

MS. ALDOUS: Your Honor, I'm going to object, number one, that is completely irrelevant. I don't even know why that's an issue in the case; number two, I think it calls for a legal conclusion of the witness, and I think that's all the objections I have. I'm kind of confused.

THE COURT: Overrule the objection, but I do think you need to break it down because it is a little confusing.

Q. (By Mr. Hagen) If I heard your testimony before, when your counsel was asking you questions just now, I thought you took a position about what you accused Parkland of doing wrong, did you not?

A. I don't know. I don't know what you mean.

Q. Did you accuse Parkland of any retaliation against you?

MS. ALDOUS: Your Honor, I'm going to object —

THE COURT: Can you maybe direct him to where that's coming from? Is it coming from that last exhibit that was addressed with plaintiff's counsel? Perhaps that's where you can direct him.

Q. (By Mr. Hagen) Well, to begin with, the — did you ever apply for a COPC job with Parkland?

A. Never.

Q. Okay. Look at Plaintiff's Exhibit 22, please.

MS. ALDOUS: I believe it's already admitted as evidence, Your Honor.

THE COURT: Let's see. I think it is.

MS. ALDOUS: It is in.

THE COURT: It is not?

MS. ALDOUS: It is.

THE COURT: It is. Okay, thank you.

Q. (By Mr. Hagen) This is your charge of discrimination against Parkland, is it not?

A. Yes.

Q. Personal harm. On or about August 7, 2006, I was denied employment for a staff physician at Parkland COPC in retaliation for opposing or engaging in an activity protected under Title VII.

Didn't I read that correctly?

A. You are reading it correct, but that doesn't mean that's what I did.

Q. Okay. But this is what you signed right here, is it not? Is that your signature at this time?

A. When I went to do this —

MR. HAGEN: Objection.

A. Yes, it's my signature.

THE COURT: Dr. Nassar, you know at this point not to answer when there is an objection, all right? So please don't do it again.

THE WITNESS: Okay.

THE COURT: All right. The question is, is this his signature? And that's your question. Is there an objection?

MS. ALDOUS: I object, because he said is this your signature at this time.

THE COURT: It's argumentative. It is; rephrase.

Q. (By Mr. Hagen) Is this your signature on Plaintiff's 22?

A. Yes.

Q. Does it say, I declare under penalty of perjury that the above is true and correct?

A. That's what it says, yes.

Q. Okay. And it says that you were denied employment at a COPC job at Parkland, does it not?

A. That's what it reads, yes.

MR. HAGEN: Thank you. Pass the witness.

THE COURT: Ms. Aldous.

MS. ALDOUS: You know what? Nothing.

THE COURT: Dr. Nassar, you may step down. Call your next witness, Mr. Hagen.

* * *

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THE COURT: Motion is denied.

MR. HAGEN: Okay. We would ask the Court for a directed verdict as to the evidentiary aspect of the retaliation theory. We believe that the evidence is undisputed that the University of Texas opposed or

objected to the job change plan by the plaintiff earlier in time than any theory of protected activity in the case, and we believe that it was adequately established to the extent that it actually becomes uncontested in the case. So on that basis, we would ask for a directed verdict as to that theory.

THE COURT: Overruled. There is a great deal of evidence on both sides of this case as to both theories.

MR. HAGEN: Okay.

THE COURT: Let's move on to the next part of your motion.

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MR. HAGEN: I understand that. Thank you for the clarification as to the denial of that request. And if the Court does see fit to include the specifically or the objecting to by the University, I think that can help the jury understand what it is that they are being asked to decide whether or not was, you know, an adverse employment action.

THE COURT: And I'm going to put that in there.

MR. HAGEN: The other thing on this question, then, is, I think we are entitled to an affirmative defense on this retaliation theory. And I think it says, essentially, would the defendant have objected to the plaintiff's job change or job application to work at Amelia Court Clinic for Parkland even in spite of the conversation on or about April 27 with Greg Fitz.

THE COURT: What case are you relying upon for this? Is this this pretext-plus line of cases, Septimus and Rachid?

MR. HAGEN: I think if an affirmative defense is pled for retaliation, I think we are just entitled to it.

THE COURT: Well, I am not — I will look at this. And I know that Septimus has some language about following a prior panel decision and pretext plus does, but I'm not sure the way you are phrasing it that it is correct as a matter of law. Here, it is a motivating factor. We say, because of it the law is a motivating factor. It doesn't have to be the sole reason, it doesn't have to be but for. Everyone I think agrees on that.

So what you are telling me is that you want some language in there that indicates that, if you find they would have done it anyway, which goes way back to Price Waterhouse, and I'm not sure it is a correct statement of the law because — I'll look at it.

MR. HAGEN: I think in the absence of an affirmative defense, then, Septimus, I think, says it's clear error —

THE COURT: I know what it says.

MR. HAGEN: — to omit something that says essentially sole cause.

THE COURT: Well, I think we answer that by putting in there only motive. It does not have to prove retaliation was the only motive, but must prove the defendant acted at least in part to retaliate.

MR. HAGEN: But that is — that gives them leeway as opposed to the defendant a sort of an exclusivity entitlement there.

THE COURT: How do the two square?

MR. HAGEN: Well, I think the — well, I think that the defendant — the plaintiff must show that it is the sole motive of the defendant. Well, under but for language, I'm wondering in the language of Septimus, I think that it's something more confining, it's something more stringent than motivating factor.

THE COURT: All right. I understand what you are asking for, and I will look at the law on this and make sure this is correct. But my understanding is, we are still at motivating factor for retaliation. If that wasn't the case, then, this instruction that says, plaintiff doesn't have to prove that retaliation was the only motive, would be incorrect.

MR. HAGEN: Correct. And —

THE COURT: You're taking the position it's a but-for.

MR. HAGEN: Yes, we are, under Septimus. And as for constructive discharge, I think we've covered the main points for retaliation. Mr. Gibson, would you like to address constructive discharge?

MR. GIBSON: Sure. Your Honor, it appears to me that the instructions have turned this case into a motivating factor case and not a pretext case or that is the way it's been instructed. However, its instructions include both instructions for motivating factor and pretext, and it's confusing to me as to what position the Court —

THE COURT: Describe and explain to me, because I don't think the cases are very helpful in this regard, what a pretext case is.

MR. GIBSON: Right.

THE COURT: I understand this all started back with Price Waterhouse.

MR. GIBSON: Right.

THE COURT: Price Waterhouse had an idea that, if you can bring up a defense that I would have done this anyway, that you can prevail. Now, that later has permutated into that kind of a defense being appropriate for damages but not during the liability phase. And so I don't know that that line of cases that addresses that — I think Price Waterhouse been pretty much swept aside for liability — is appropriate.

MR. GIBSON: I agree that Price Waterhouse has been swept aside for liability for the discrimination claim based on the amendments to Title VII, which are reflected in 42 U.S.C. 2000(e) — and would you like the statute?

THE COURT: No, I just want to hear your argument.

MR. GIBSON: Okay. However, the instruction to me is confusing because it includes both the pretext instruction and a motivating factor instruction, and I'm not sure what the jury is supposed to conclude.

Secondly, this is, again, a constructive discharge case. It is more like a hostile work environment claim than a typical discrimination claim. Therefore, the idea that either motivating factor or pretext is applicable, I don't think either is applicable because

the con- — the idea of either one is whether or not the employment decision was taken with an intent to discriminate.

THE COURT: Right now we are talking about, in your view, the retaliation claim?

MR. GIBSON: The constructive discharge claim only.

THE COURT: Okay.

MR. GIBSON: That is a hostile work environment-type claim.

THE COURT: So tell me what it is you want it to say in general terms.

MR. GIBSON: It's fine to me, the beginning, up through the first, second, third. Then, to state that the proof has raised religious preference was a motivating factor, the motivating factor language to me does not make sense.

THE COURT: My question is, what should it say in your view? Before you start, give me a minute here to review this case again.

(Pause in the proceeds.)

THE COURT: Go ahead.

MR. GIBSON: Your Honor, I think, you know, through the paragraph that says, first, second and third, after that, I think — I think that is essentially all that's necessary.

THE COURT: And what would be all that's necessary?

MR. GIBSON: Through, to establish this claim, plaintiffs must prove each of the following.

THE COURT: And then what, take it out? Take everything out?

MR. GIBSON: Yes.

THE COURT: What else?

MR. GIBSON: Finally, the same act or inference that was proposed in the defendants' initial jury charge. That was one of the final topics that I wanted to discuss prior to the break.

THE COURT: Go ahead.

MR. GIBSON: That is something that is clear under the Stover case, 116 — or document 116, our proposed jury instructions, footnote 6 on page 7.

THE COURT: And you're asking for — tell me what — go ahead.

MR. GIBSON: Yes. Would you like me to read it?

THE COURT: Yes.

MR. GIBSON: Basically we would propose the following: If you find that the same person who promoted the plaintiff is also one of the people who allegedly discriminated against him, you may consider it inherently inconsistent that an individual who is willing to hire or promote a person who is a member of a protected class will discriminate against that same individual because he is a member of that class.

THE COURT: Okay. And I think the rest of it is all filed and part of the record. That's not from a 5th Circuit pattern.

MR. GIBSON: No, it's not, it's from a case.

THE COURT: Does that case specifically stand for the proposition that they approve that in a jury charge.

MR. GIBSON: Yes, it is. That is the quoted jury instruction from that case.

THE COURT: All right. And give me the case again.

MR. GIBSON: The case is Stover v. Hattiesburg Public School, 549 F.3d 985.

THE COURT: My general rule is to stick with the patterns and not add anything from a case unless it's been approved as a charge and, even then, if I find that it's helpful to this; otherwise, to keep the charge as simple as possible. So if it's not error for me to leave that out, I don't think I will add it. So I would deny your request to add that as a charge.

What else did you have?

MR. GIBSON: I think that's all, Your Honor.

THE COURT: All right. I need another 15 minutes or so to see how I'm going to rule on some of these other major revisions, and it will be hopefully no more than 15 minutes so we can get this resolved tonight.

(Recess taken from 4:57 to 5:29.)

THE COURT: Couple of things: I moved the language on the business judgment to where everyone agreed to move it. Just with regard to Mr. Gibson, your points on this being a pretext case and somehow warranting this kind of but for causation under Septimus, I deny those requests. I don't think that this is what we would define as a pretext case. In any event, I don't think it's the defense's call to describe a

case as a pretext case or not. This has been tried as a mixed motive case.

There is a very helpful case that I think really clears up the confusion — and there's plenty of it under Septimus and Rachid on this point — and that is written by Judge Godbey. It is probably one of the most well-written opinions on these points that I have found. Smith v. Xerox, 584 F.Supp.2d 905, and he cites to an unpublished 5th Circuit case. It's much more slim than his, Block v. Kelly Services, and that's 2006 Westlaw 2571012.

The bottom line is that the would have done it anyway defense has been completely taken out of the statute — I mean of the case authority, the Supreme Court case authority, as intended by the changes to the statute. To the extent that it's in the case — it's not in this case, and this case is a mixed motive retaliation case, which calls for — and I think has been verified by the 5th Circuit and certainly as explained by Judge Godbey in this case — calls for a motivating factor; that the discriminatory intent is a motivating factor, it doesn't have to be the sole motivating factor.

Therefore, you wouldn't be entitled to this would have done it anyway type of defense or sole motivating factor type of defense that you have asked for, so I am denying that request.

I want to make sure I have covered most of the objections, because I want to get started at 9:00. Mr. Gibson?

MR. GIBSON: Yes, Your Honor. There is some slight language change that both sides have agreed to —

THE COURT: Great.

MR. GIBSON: — and then I would like to just make some objections that we made previously just so they are on the record as to this jury charge.

THE COURT: Fine.

MR. GIBSON: On the retaliation claim, the final paragraph, the business judgment paragraph that was moved from the constructive discharge cause to the retaliation cause, we would suggest — and plaintiffs agree — that instead of the references to race, national origin or religious preference, it should be to protected activity.

THE COURT: Yes. What page are — you.

MR. GIBSON: Page 10, first full paragraph. The first sentence would read: It is not a violation of law, however, for an employer to make an employment decision based on factors other than the plaintiff's protected activity. And then that would — the same would occur two sentences down: The decision as to what criteria shall be considered in making business and employment decisions lies fully in the hands of the employer so long as the employee's protected activity is not a motivating factor.

THE COURT: Everyone agree?

MR. WALKER: Yes, Your Honor.

MR. GIBSON: And finally, the next sentence: The law does not protect employees — so you can strike that entire, of a particular race, national origin or religious preference to, the law does not protect employees from erroneous or even arbitrary personal

decisions so long as his protected activity is not a motivating factor.

THE COURT: All right.

MR. GIBSON: Finally: Similarly, it does not entitle employees to preferential treatment.

THE COURT: Employees to preferential treatment.

MR. WALKER: I would say the last sentence should say: Similarly, it does not entitle employees to engage in protected activity, preferential treatment.

MR. GIBSON: I have no problem with that change, Your Honor.

THE COURT: Okay. What else? We're not going to do it tonight, so don't worry about that.

MR. GIBSON: Finally, Your Honor, we would just like to, just for the record, make our objections based on previous requests we have made that did not make it into the charge.

THE COURT: Okay. How about this —

MR. GIBSON: And that would be very quick, Your Honor.

THE COURT: Very quick, then, go ahead.

MR. GIBSON: We object to the charge because it does not include same act or inference, description or instruction as we previously requested.

We also object to the charge because it lacks the affirmative defense. As this case has been described in the mixed motive instruction, we would ask that the pattern jury instruction 11, 11.1, be fully included, which includes the affirmative defense,

that you must determine whether a defendant proved by a preponderance of the evidence it would have made the same decision even if defendant had not considered plaintiff's protected trade. And that is, again, 5th Circuit pattern jury instruction 11.11.1. We object — hold on just a moment.

THE COURT: That's all right.

MR. GIBSON: We object to the use of the mixed motive standard in the constructive discharge

claim.

We also object to lack of date restrictions on the protected activity for the retaliation claim. We would request that that be limited to protected activity on April 27th or after, as described in the charge.

On the constructive discharge claim, we would request that that be based on discriminatory conduct occurring on October 3, 2005, or after, as described in the charge, and we would request that instructions be given on both.

MR. HAGEN: April 27th.

MR. GIBSON: That's the retaliation claim.

MR. HAGEN: Yes, sorry.

THE COURT: Okay.

MR. GIBSON: Finally, we would request that race not be included, as it was not in the original charge. And we would request a legal instruction on the Ryan White Act and the propriety of billing under that act.

THE COURT: Thank you.

MR. GIBSON: Thank you, Your Honor.

THE COURT: The requests are denied. I'm going to have a fresh draft for you. Please be here by no later than 8:15 on Monday. I had the temptation to tell the jury to come later, but I think we can get this done, and hopefully they won't have to wait too long. So we will have it ready for you and we can look at it one more time. Anything else? I'm telling you now, no new objections. We might find some typos over the weekend, and of course we will fix those.

MR. LAUTEN: Thank you, Judge.

MR. HAGEN: To the extent that Mr. Gibson said April 27, 2008, we meant to say April 27, 2006.

THE COURT: Okay. Thank you all. Have a good weekend. Oh, how much time do you want, and I'm going to let you have what you want within reason.

MS. ALDOUS: I would say 35, 45 minutes. Do we get a rebuttal?

THE COURT: Yes.

MS. ALDOUS: 45 minutes.

THE COURT: 45 minutes total?

MS. ALDOUS: Total, yeah.

THE COURT: I think that's —

MR. HAGEN: Seems like too much, but if that's —

MS. ALDOUS: It probably is.

THE COURT: Well, I'm okay with that. There's been a lot of time and work put into this case. And it's a little confusing as to the sequence of events with regard to each of the allegations. So 45 minutes each. You don't have to use it all, but you can have it. Let

me know about opening and closing mornings. Have a nice weekend everyone.

(Court in recess for the day at 5:37 p.m.)

* * *

JURY TRIAL EXCERPTS

MAY 24, 2010

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NAIEL NASSAR, MD, *Plaintiff,* v. UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, PARKLAND HEALTH & HOSPITAL SYSTEM, BETH LEVINE, M.D., AND J. GREGORY FITZ, M.D. *Defendants.*	§ § § § § § § § § § § § § §	Civil Action No. 3:08-CV-1337-B

JURY TRIAL

May 24, 2010

Before: The Honorable Jane J. Boyle
United States District Judge

CERTIFIED TRANSCRIPTION

I, Shawnie Archuleta, CCR/CRR, certify that the foregoing is a transcript from the record of the proceedings in the foregoing entitled matter.

/s/

July 30, 2010

* * *

[18]

THE COURT: Well, my concern is just that there is a confusing state of the law right now. And now, even the recent case of the 5th Circuit's construing Judge Godbey's opinion and actions, reflects the state of the confusion. So I think it's probably better to keep this as bare bones on the charge — I mean to the pattern as we can, and that's why I decided to do that.

MR. WALKER: I think the original one we started with on Friday was close to this, so I am comfortable with that Your Honor.

THE COURT: Okay. Mr. Gibson.

MR. GIBSON: Thank you, Your Honor. If I may just make one more point?

THE COURT: Of all the points you want to make, go ahead and make them.

MR. GIBSON: Thank you, Your Honor. Regarding the affirmative defense, which has been brought up before, if I just may point to Smith v. Xerox, that does have a very good discussion of the affirmative defense and the mixed motive context and the impact it has on the available remedies for the

plaintiff.

Also there's a case called Garcia v. City of Houston, 201 F.3d 672, 5th Circuit 2000.

THE COURT: I am familiar with it.

MR. GIBSON: Yes. Your Honor, if the affirmative defense is not included here, it will be in the damages

phase, because that — whether or not that affirmative defense is proven, determines what remedies are available to the plaintiff under 42 U.S.C. 2000(e). I can give you the exact section, but I am sure you are familiar with that.

THE COURT: But neither of those cases say — in fact, the recent one specifically says, we can't — if it's a mixed motive case, we should use the mixed motive question. So I'm not sure what you are asking, but I want you to be specific on what you are objecting to. All right?

MR. GIBSON: Yes, Your Honor. We are requesting the mixed motive defense, which is laid out in the 5th Circuit Pattern Jury Charge, Section 11.11.1, which states — which incorporates the standard from the Title VII statute regarding the mixed motive defense and whether or not — which determines which remedies are available to the plaintiff. If the defendant proves that they would have made the same decision absent the discriminatory motive, then the remedies available to the plaintiff are severely limited.

In this case, the plaintiff has — it's limited to injunctive relief, declaratory relief, attorney's fees and costs. In this case, the plaintiff has not requested injunctive relief or declaratory relief. Therefore, if we prove that, the only relief available to the plaintiff would be attorney's fees and cost, which is at the discretion of the Court, is not a subject matter for the jury.

THE COURT: My question to you would be: This argument that you're making, do you have a case

that pertains specifically and is on point to the framing of the charge in the liability phase and whether or not it should be framed in that fashion or not?

MR. GIBSON: No, Your Honor, I do not have a case that states whether that charge should be in a bifurcated context, whether that should be presented in the liability phase or the damages phase.

THE COURT: Any other objections?

MR. HAGEN: If I may just make one final point on that note. If that is put in the damages phase of this case, the defendant would have — may find it necessary to re-raise the entire issue of whether or not they had — they would have done it anyway, they would have done it in the absence any motive so — you know, which potentially brings all sorts of new facts back into the damages phase.

THE COURT: So what are you asking for?

MR. GIBSON: We are asking that the mixed motive defense, which is set out in 5th Circuit Pattern Jury Charge 11.11.1, be included in this charge as a separate question after each count.

THE COURT: All right. And you have no cases, though, that support that position with respect to the liability phase of the Title VII retaliation case.

MR. GIBSON: Your Honor, I do not have a case that says that charge should be necessarily included in the liability —

THE COURT: All right. Do you have any other objections for the record?

MR. GIBSON: We just restate our previous objections.

THE COURT: My concern this morning, yes, I'm frustrated that you brought up all this new requested information this morning. I guess I wouldn't necessarily fault you for it, given the state of the law, Mr. Gibson. The problem I have is for you to stand there and tell me you're not asking for anything new. It's materially different than it was Friday. That's my concern about the conduct that I have seen from you this morning. With that said, is there anything else before we make all the copies?

MS. ALDOUS: Nothing, Your Honor.

THE COURT: It's going to take about 15 minutes to get these copies made.

MR. WALKER: Your Honor, may I have one moment?

THE COURT: Mr. Walker. I want to give you a chance to go ahead and put on the record whatever your concern was as I was leaving the courtroom.

MR. WALKER: Your Honor, my only point was, if you were to consider adding the affirmative defense requested by the defendants, when it is bifurcated, I think it certainly is not appropriate in the liability aspect. I brought up the issue that we didn't want to impair the ability to argue it during the damages portion, but it certainly has nothing do with liability. The statute and the phrasing of the statutes makes clear that the only thing that defense gets them is a limitation on damages, and it's not a limitation on liability.

THE COURT: Right. I think the issue was addressed by Judge Godbey in the Xerox case, wherein he noted that the statute, as it had been amended, particularly and specifically took out the, I would have done it anyway defense, until the damages phase as a limitation on liability. So I am comfortable with that as well.

And I want to make sure I know the timing on each side. Thank you very much.

MR. WALKER: Thank you, Your Honor.

THE COURT: Plaintiffs are comfortable with the charge at this point?

MS. ALDOUS: Yes, Your Honor, we are.

* * *

JURY TRIAL EXCERPTS

MAY 25, 2010

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NAIEL NASSAR, MD, *Plaintiff*, v. UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, PARKLAND HEALTH & HOSPITAL SYSTEM, BETH LEVINE, M.D., AND J. GREGORY FITZ, M.D. *Defendants*.	§ § § § § § § § § § § § § §	Civil Action No. 3:08-CV-1337-B

JURY TRIAL

May 25, 2010

Before: The Honorable Jane J. Boyle
United States District Judge

CERTIFIED TRANSCRIPTION

I, Shawnie Archuleta, CCR/CRR, certify that the foregoing is a transcript from the record of the proceedings in the foregoing entitled matter.

/s/

July 30, 2010

* * *

[56]

NAIEL NASSAR, M.D.,

having been previously sworn, testified as follows:

* * *

[77]

CROSS-EXAMINATION

BY MR. HAGEN:

* * *

[81]

Q. Just putting this into context and in fairness, you did resign on July 3 of 2006 in an e-mail to Dr. Levine. To Beth Levine you said, quote: This should serve as my resignation notice as of today, July 3, '06. A full resignation letter shall follow on Wednesday.

Correct? Do you remember that?

A. Does it say on Wednesday? I don't have the document. Does it say on Wednesday?

Q. This is just —

MR. HAGEN: May I approach, Your Honor?

THE COURT: You may.

Q. (By Mr. Hagen) Just briefly for context, that's your first indication to Beth Levine on this topic was that statement, was it not?

A. I sent that letter on July 3rd.

Q. Okay. And it was an e-mail that said: This should serve as my resignation notice as of today, July 3, 2006. A full resignation shall follow on Wednesday?

A. Correct.

Q. And your resignation meant that you were going to give up the title assistant professor at UT Southwestern, correct?

A. I wouldn't be there.

Q. And then your title at that moment would go away; is that correct?

A. Correct.

Q. Did, at that point in time, when you sent that resignation letter, did you have the thought that Parkland had gone ahead and you were going to get that job at Parkland under that offer letter dated July 3 of '06?

A. Yes.

Q. And that meant that you would be able to go ahead and transition from employment at UT to Parkland as an Amelia Court Clinic doctor, correct?

A. Yes.

Q. And at that time you weren't interested in going to a Parkland COPC, correct?

A. Yes, correct.

Q. That's correct?

A. Correct.

Q. And that position at Parkland working — that you wanted to craft, that position working in Amelia Court Clinic as a Parkland doctor, was the one that Greg Fitz objected to, correct?

A. That was the job offer that he crafted.

Q. Just in terms of what that precise job duty was that you wanted for yourself, it was working at Amelia Court Clinic as a Parkland employee, and that's the one Greg Fitz objected to, correct?

A. Yes, sir.

Q. And then is it the case that you found out Dr. Ross didn't sign off on that July 3 letter for the arrangement?

A. That came later, yes.

Q. And in fact, you're contending in this lawsuit that no COPC position was ever offered to you by Parkland later in time or at any time.

A. That's true.

Q. And in your July 3 resignation letter that you distributed by e-mail on July 7, 2006, that the jury has had a chance to look at under the e-mail cover letter, I do understand that you distributed that on July 7, and that you expressed an intention to stay all the way until the end of August of 2006?

A. Yes, sir.

Q. So was it the case that you first resigned, thinking that you had your job in that e-mail that we read to the jury, and then upon realizing that you didn't have that job because Dr. Ross didn't sign off, you decided, well, I'm going to resign, but I will stay

through the end of August of 2006. Is that kind of how it played out?

A. Can you repeat that, please?

Q. Sure. Your e-mail of July 3 said, I resign, correct?

A. Yes.

Q. And then your letter that you distributed on July 7, with an explanation and accusations against Beth Levine, in that you mentioned that you would stay through the end of August of 2006, right?

A. I don't recall if this was part of the letter or not.

Q. Well, just for, again, context, before we move on and for clarification, this is — this is the cover letter, the cover e-mail, is it not, and then it's Defendant's Exhibit Number 19.

A. Yes, it says: Enclosed please find my copy of my resignation letter.

Q. And it does say at the very first sentence, doesn't it, that you are going to go ahead and stay until September of 2006?

A. That was the end of my contract.

Q. Okay. And you decided to go ahead and do that because the job that you thought Dr. Ross at Parkland was going to sign off on didn't materialize, that's the context of this.

A. I don't know what you are talking about.

Q. I don't mean to belabor the point and badger you on it, but your July 3 e-mail to Beth Levine says, I

resign. This is my resignation notice as of today, July 3, 2006, correct?

A. Correct.

Q. And then the job at Parkland didn't materialize, and so you issued this resignation letter that said, I will stay until the end of August 2006?

A. No, that's not true. That's not true.

Q. If you would look at Defendants' Exhibit Number 21 also.

A. Yes, sir.

Q. And right there at the beginning, do you see this indication from Dr. Ross?

A. Yes, sir.

Q. He says: Please don't commit to anything just yet. The reason you have not heard back from me is that many conversations are going on to try to resolve this issue. We value your services and are trying to find acceptable solutions for all the parties. Do you see that expression from Sam Ross on July 11, 2006?

A. Yes, sir.

Q. By that time you had already indicated that you were going West; is that right?

A. I signed on the contract for my current employer on 7/29, so this is a full 18 days after that.

ORDER GRANTING ATTORNEY'S FEES AND COSTS

DKT. NO. 160, JULY 27, 2010

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NAIEL NASSAR, MD, *Plaintiff,* v. UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, PARKLAND HEALTH & HOSPITAL SYSTEM, BETH LEVINE, M.D., and J. GREGORY FITZ, M.D. *Defendants.*	§ § § § § § § § § § § § §	Civil Action No. 3:08-CV-1337-B

MEMORANDUM OPINION AND ORDER

Before the Court is the motion of Plaintiff, Naiel Nassar, M.D. ("Plaintiff" or "Dr. Nassar"), for an award of attorneys' fees and costs pursuant to 42 U.S.C. § 2000e-5(k) following a jury verdict in his favor on his claims of discrimination and retaliation against Defendant UT Southwestern Medical Center at Dallas ("Defendant" or "UT Southwestern"). (doc. 146). Upon consideration of the arguments and submissions of the parties in light of the governing authority, the Court **GRANTS** Plaintiffs' motion part and **DENIES** it in part. For the reasons set forth

below, the Court awards attorneys' fees in the sum of $489,927.50 and taxable costs of $10,705.61.

* * *

III.

CONCLUSION

For the reasons stated above, the Court finds that Dr. Nassar is entitled to attorneys' fees calculated through the lodestar method as modified in this Order and declines to adjust the lodestar upwards or downwards. Accordingly, the Court **GRANTS** in part Dr. Nassar's motion and **DENIES** it in part. The Lauten firm may recover attorneys' fees in the amount of $314,720, which accounts for the reduction in the hourly rate described above. The Aldous firm may recover attorneys' fees in the amount of $175,207.50, which accounts for the reduction in hours described above. Dr. Nassar is entitled to recover costs in the amount of $10,705.61. The Court denies Dr. Nassar's prospective request for attorneys' fees that may be incurred in post trial motions or appeal

SO ORDERED

SIGNED: July 27, 2010

/s/
JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

STIPULATED SUPPLEMENTAL RECORD ON APPEAL

MAY 6, 2011

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 11-10338

NAIEL NASSAR, MD,

Plaintiff - Appellee,

v.

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER AT DALLAS,

Defendant - Appellant.

On Appeal From the United States District Court
for the Northern District of Texas, Dallas Division
Cause No. 3:08-CV-1337-B

STIPULATED SUPPLEMENTAL RECORD ON APPEAL

Whereas, upon review of the court reporter's transcript, the parties recognized that the court reporter's transcript of the trial of this case does not contain the contents of the videotape deposition of Sam Ross, M.D. that was played for the jury, but

instead reads as follows in Volume 2, page 200, line 4:

"(Videotape of Dr. Ross played.)"

And whereas the parties are in agreement that the portions of the videotape deposition of Sam Ross, M.D. that were played at the trial conformed to the Plaintiff's pretrial designations of his testimony (Plaintiff's Amended Designation of Sam Ross, M.D., District Court Doc. 138).

Therefore, Naiel Nassar, M.D. and the University of Texas Southwestern Medical Center at Dallas, comprising all the parties to this appeal, hereby STIPULATE that the following portions of the videotaped deposition of Sam Ross, M.D. were played to the Court and jury during the trial, as referenced in Volume 2, page 200, line 4 of the court reporter's transcript:

Page 5, Line 6 through Page 5, Line 8

Q Would you please state your name for the record.

A Samuel Lee Ross, Jr.

Page 6, Line 20 through Page 7, Line 15

Q If you would walk me through college and medical school, any certifications you've got, that sort of thing.

A Okay. Undergraduate North Texas State University, BA in biology, medical school, University of Texas Health Science Center, San Antonio, Doctor of medicine, master of science in medical

management from UT Dallas, and then board certification in family medicine.

Q When you say family medicine, are you boarded in family practice —

A Yes.

Q — or are you boarded in internal medicine?

A Boarded in family practice.

Q Where did you do your residency?

A At St. Paul Medical Center and Parkland.

Q Is that a three-year program?

A Yes, sir.

Q Have you done any fellowship training beyond family practice?

A No, sir.

Page 8, Line 10 through Page 8, Line 21

Q Dr. Ross, I've got a time line of documents I'm going to go through and I'm going to try to be as efficient as I can because I don't have any interest in wasting your time, but I need to get some background information like who you currently work for. Can you tell me — you're the CEO of a company in Baltimore; is that correct?

A Yes, sir.

Q And CEO stands for chief executive officer?

A Yes, sir.

Q What's the name of your current employer?

A Bon Secours Health Systems, Inc.

Page 9, Line 22 through Page 10, Line 20

Q Okay. Walk me through the positions that you held at Parkland from 1991 through August of 2006 when you left.

A Okay. After the medical director position I believe in '93, I was promoted to vice president and medical director for the employee physician office and in 1994 I was initially the interim — I was the senior vice president and the interim medical director for Community Oriented Primary Care, and then following that, I was the senior vice president for ambulatory care, which was an expanded role.

Following that, I was the chief medical officer — senior vice president and chief medical officer. Then I was the interim chief operating officer and then executive vice president and chief medical officer.

Q You've kind of rattled off a series of positions there. Were each of those positions that you went through a gradual promotion each time?

A Yes, sir.

Q Okay. So what was your position in June of 2006 with Parkland?

A Executive vice president and chief medical officer.

Page 11, Line 1 through Page 11, Line 8

Q How much of your work was administrative?

A Probably 99 percent was administrative.

Q Okay. Did you have the authority to hire and fire in June of 2006 for Parkland?

A Yes.

Q Okay. How long had you had the authority to hire and fire at Parkland prior to June of 2006?

A In some capacity, ever since October of 2004.

Page 12, Line 18 through Page 12, Line 20

Q And Dr. Fitz and Dr. Levine are both in this room, correct?

A Yes.

Page 16, Line 23 through Page 17, Line 17

Q Were you involved in any conversations in April, May or June of 2006 that you recall about Dr. Nassar seeking employment with Parkland?

A Yes.

Q Okay. Tell me what — start with the first one and you walk me through it that you recall.

A I don't remember time frames, but I recall that Sylvia Moreno and Dr. Nassar and Dr. Keiser at different times had brought up the issue of whether or not employment by Parkland was a viable option.

Q Okay. Can you be more specific?

A Well, that was basically it. Could they be — was there a scenario that they could be employed at Parkland.

Q Did you have a conversation to that effect in April, May or June of 2006 that you recall?

A I had conversations, yes.

Q Okay. And who were your conversations with?

A At different points with either of those three individuals.

Page 19, Line 14 through Page 21, Line 14

Q Well, walk me through the process. If I'm a — if I'm an internal medicine doctor and I want to come work for Parkland and I have privileges already in Texas and I have privileges already at Parkland, tell me the hiring process. What do I do? What are the stages to get hired?

A Okay. First, the position has to be posted.

Q Okay.

A So if a position is posted and someone expresses a desire for that position, then they would go through the process of submitting a resume, CV for — and filling out an application for employment. That's the first step.

Q Okay. What's the next step?

A As a result of the affiliation agreement between Parkland and UT Southwestern and a result of the medical staff bylaws, rules and regulations, for any physician coming through COPC, it requires that you have to be able to acquire a clinical faculty appointment from the related department at UT Southwestern.

Q Who told you that?

A It's in the affiliation agreement. It's in the bylaws, rules and regulations for employment at Parkland.

Q So you're telling me that, if I look at that agreement, I'll find language in there that says that

before you can hire a doctor, you've got to get Dr. Fitz's permission?

A Have to get the chairman's permission because the chairman is the only one that can grant a clinical faculty employment, and the only way you can get privileges at Parkland per the bylaws, rules and regulations is that you have a clinical faculty appointment, and there are specific criteria for achieving that.

Q So the chairman would have the authority at the University of Texas Southwestern to prevent someone from being hired at Parkland?

A If they did not meet criteria for a clinical faculty appointment.

Q A chairman for UT Southwestern would have the authority in your mind to prevent even a qualified doctor from being hired at Parkland?

A Not in my mind; it's what the bylaws, rules and regs require.

Q Okay. Tell me the name of each doctor that came to Parkland where you had to go get Dr. Fitz's permission first before you could hire that doctor. Tell me — tell me the names of those doctors.

A I don't know the names of those doctors.

Page 22, Line 5 through Page 22, Line 22

Q (By Mr. Lauten) So the answer to my question is you can't name a doctor ever, other than Dr. Nassar, where you had to go and get Dr. Fitz's permission to make a hiring decision first, true?

A I don't recall that to be totally true. I'd have to go back and look.

Q Well, can you name one as you sit here under oath today?

A No.

Q Okay. Can you think of any doctor where you can provide me the name and I can go take that doctor's deposition where, before they were hired at Parkland, they had to go get Dr. Fitz's permission first, regardless of whether you were in that job or not?

A There should be records to that effect.

Q Can you name any doctor?

A No.

Page 27, Line 21 through Page 28, Line 18

Q It says, Sylvia, please call me in reference to the salary for Dr. Nassar. He countered the offer you asked me to make, which was midpoint, 80.72 an hour equals $167,897.60. He's asking for 87.93, equaling $182,894.40. He has over 15 years' experience. With that said, it's definitely within the range. Let me know so we can proceed. Thanks, D. Do you see that?

A Yes.

Q And that's written by Denise Morgan, the physician recruitment coordinator. Do you see that?

A Yes.

Q Now, she's telling Sylvia that he countered the offer that Sylvia asked her to make; isn't that what it says?

A Yes.

Q Who gave Sylvia permission to make a verbal offer?

A I don't know.

Q Do you know when a verbal offer was made?

A No.

Q Do you know who made the verbal offer?

A No.

Page 32, Line 25 through Page 33, Line 21

Q Okay. Go to Exhibit 52. And before we get there. How long have you known Dr. Keiser?

A I don't know exactly but sometime during his time at Parkland, but I don't know exactly.

Q Well, do you consider him to be a very good doctor?

A Yes.

Q Okay. Did he have a pretty good reputation as an HIV doctor, to your knowledge?

A Yes.

Q Okay. Do you feel like he was qualified to run the HIV clinic?

A Yes.

Q Double boarded in infectious disease and internal medicine, true, double board certified?

A I don't know what his certification is.

Q Okay. You don't have any criticisms of him, of Dr. Keiser?

A In relation to?

Q His integrity, his honesty, anything like that?

A Nothing that I'm aware of.

Page 35, Line 13 through Page 37, Line 11

Q Okay. This meeting that occurred with Dr. Fitz, what did he tell you?

A About?

Q You told me there was a meeting at Dr. — with Dr. Fitz in his office, correct?

A Correct.

Q And he relayed to you that Dr. Nassar had made an allegation of discrimination, correct?

A Correct.

Q And that would have occurred after this resignation letter was brought to his attention of discrimination?

A I'm not aware of the actual timing of it.

Q Okay. What did he tell you?

A That's all that was said.

Q He just — so you went over to his office, met with Dr. Fitz, and all he said was, Dr. Nassar has made a discrimination claim, and that was the end of the conversation?

A I didn't go specifically to talk about the discrimination claim.

Q Why would you need to go talk about Dr. Nassar's discrimination claims at UT Southwestern with Dr. Fitz?

A I did not go to talk about Dr. Nassar's discrimination claim with Dr. Fitz.

Q Well, what did you go to talk to him about?

A It was about the proposed model for how we were to deliver services in the HIV clinic.

Q Okay. And what did — so it came up in a separate conversation?

A Yes.

Q Okay. Do you remember what he told you?

A That was the extent of what he told me.

Q What was Dr. Fitz's reaction?

A It was just told me as a matter of fact.

Q What did he —

A There was no reaction.

Q What did he say he was going to do about it?

A He just simply said that it was something they were following up on.

Q Okay. That's it?

A That's it.

Q What was your reaction?

A I had no reaction.

Q Did you ask to speak to Dr. Nassar about it?

A No.

Q Did you ever follow up with Dr. Nassar?

A No.

Page 38, Line 1 through Page 38, Line 5

Q All right. You were having a separate conversation where it came to your attention from Dr. Fitz that Dr. Nassar made an allegation of discrimination, true?

A True.

Page 47, Line 9 through Page 49, Line 19

Q Okay. And look at this letter — and let me ask you if we can agree on some things. It says, I would like to formally offer you a position as staff physician - internist at HIV services. Do you see that?

A Yes, sir.

Q And it says, The position is classified as exempt and full-time. It's got an hourly rate with an annual salary. Do you see that?

A Yes, sir.

Q It talks about the potential liability for Parkland in the event of some kind of incident, true?

A Yes, sir.

Q It goes on to talk about if this offer meets your approval, please sign and return the original, and then it says, This offer will remain open for 30

days. If it's not accepted by then, it's rescinded. Do you see that?

A Yes, sir.

Q And then it says, We look forward to a tentative start date of July 10th, 2006.

A Yes, sir.

Q Okay. Would you agree with me that every material item that covers — that would cover Dr. Nassar's employment is covered in this letter?

A I'm not sure.

Q Let me state it a better way. Sylvia Moreno testified in her deposition that the only loose end that had to be tied up on this hiring decision was you signing this letter. Do you disagree with that?

A I disagree with that.

Q Okay. Why?

A Because as I stated earlier, there was a number of steps required by the affiliation agreement, the medical staff bylaws, rules and regs for any physician to have a position at Parkland and all those steps had not been — been taken — had not been documented.

Q Well, whose job was it to do it?

A There were some that were by the medical staff office and then the others would have depended upon, you know, the position — the multiple conversations that would have had to have taken place.

Q Can you just show me where in that letter it says that we've got to get UT Southwestern's permission or approval first pursuant to the agreement before we can hire you? Where is that in this letter?

A Those specific words are not in this letter.

Q Nothing like that's in this letter, is it?

A This is a standard letter.

Q It's a standard letter that you use — that you've used plenty of times for hiring different doctors, true?

A That Parkland uses, yes.

Q There is nothing unique or special about this letter; this is the exact same kind of letter anybody gets when they're hired, true?

A Yes.

Q Except for it doesn't have your signature, correct?

A Correct.

Page 49, Line 25 through Page 50, Line 14

Q Why didn't you sign it?

A Because all of these steps had not been taken.

Q You're pointing to a letter saying "these steps." There are no steps in the letter you're pointing to.

A If you went to the medical staff office when — first of all, when there is a position posted and

then there is an application process for that position, the medical staff office has a series of steps that they take. One of those series of steps that precedes the offer letter is the approval by the specific chairperson for that department.

Q And who is the chairperson?

A The chairperson for?

Page 50, Line 22 through Page 51, Line 1

Q (By Mr. Lauten) Go ahead.

A It would be the specific chairperson for that department.

Q Which would be Dr. Fitz?

A Yes.

Page 53, Line 22 through Page 55, Line 9

Q Okay. And then it says, Dr. Nassar comes to us with 13 years of experience. Do you see that?

A Yes, sir.

Q And it says, He is fellowship trained and double boarded in internal medicine and infectious disease. Do you see that?

A Yes, sir.

Q And it says, He has been working in the PHHS HIV/AIDS department as an associate medical director and as an assistant professor of medicine for the last five years with UT Southwestern, correct?

A Yes, sir.

Q It says, We feel with the vast amount of experience Dr. Nassar brings to PHHS as well as the

department, $182,894.40, which is over the midpoint of the salary range, is deserved. Do you see that?

A Yes, sir.

Q You're not testifying that that amount wasn't — wouldn't be fair for someone with Dr. Nassar's credentials, right? A No, sir.

Q Okay. Do you know anything about Dr. Nassar's reputation as a doctor?

A No, sir, other than what I knew about him at Parkland.

Q Okay. What did you know about him at Parkland?

A That he worked in the HIV/AIDS clinic and also attended on the units — the inpatient units as well.

Q Was he courteous and polite to you when you'd have dealings with him?

A Yes.

Q Respectful?

A Yes, sir.

Q Did you find him to be a good doctor based on at least what you heard at Parkland?

A Yes, sir.

Page 58, Line 11 through Page 58, Line 17

Q (By Mr. Lauten) Do you recall there being critical staffing issues at Parkland?

A I don't have any specific knowledge of what the critical staffing issue was without having investigated and gotten more detailed information.

Q And you did no investigation?

A No.

Page 65, Line 20 through Page 66, Line 16

Q And it says, It looks like we have lost Naiel. Indecision and poor decisions have cost us all the only 100 percent primary care physician at Amelia Court. Besides Dr. Keiser, he was the only UT faculty that supported Parkland administration and policy. I am going to start working on another candidate. Do you see that?

A Yes, sir.

Q Do you know if you've ever seen this e-mail before today?

A If it was dated to me on 7/11, I must have seen it on that date.

Q What's your reaction to that e-mail, Poor decisions and indecision have cost us the only 100 percent primary care physician at Amelia Court?

A I have no reaction.

Q No reaction at all?

A No, sir.

Q What — what was your position, again, in June of 2006?

A Executive vice president and chief medical officer.

Page 68, Line 25 through Page 69, Line 3

Q (By Mr. Lauten) Can you — can you think of any reason that Southwestern would have for not wanting Dr. Nassar to work for Parkland?

A No, sir.

Page 69, Line 19 through Page 69, Line 25

Q Let me ask you this: As the executive vice president and chief medical officer of Parkland, have you ever heard of anyone contacting a pharmacy and telling the pharmacy not to fill a physician's prescriptions that's in good standing with the Texas Medical Board?

A I'm not aware of any situation, sir.

Page 91, Line 16 through Page 91, Line 23

Q Dr. Ross, you've talked about this contract a bunch, but let me ask you this: Do you agree that if the reason Dr. Fitz didn't approve Dr. Nassar coming to Parkland was because he made an allegation of discrimination in his July 3rd letter, you'd agree with me that that would be wrong?

A If that were the case, that would be wrong.

Q And that would be discrimination, true?

Page 92, Line 1

A If that were the case.

Page 98, Line 6 through Page 98, Line 24

Q We can agree that at the time Dr. Nassar applied for employment at Parkland, he already had privileges at the hospital, true?

A Yes, sir.

Q Meaning that he could start right away, correct?

A Technically, yes.

Q Okay. And he had been through the HR department as far as you know, true?

A I have no knowledge of him being through the HR department.

Q And I've shown you the application where, as of July 10th, there were no other applicants for that job, true?

A Yes, sir.

Q And you're not disputing what's in the documents, that he was the most qualified candidate, true?

A Yes, sir.

Page 101, Line 19 through Page 102, Line 1

Q (By Mr. Lauten) She said that you admitted to her that you needed Dr. Fitz's blessing first. Is that true?

A In the context of what I described earlier, that would be true.

Q Okay. And you never got Dr. Fitz's blessing, true?

A No.

Page 104, Line 9 through Page 104, Line 21

Q You're not testifying that — let me ask you this: Sylvia Moreno, did you find her to be an honest person when you worked with her?

A Yes, sir.

Q A 30-year Parkland employee, you don't have any criticisms of her?

A No, sir.

Q Did she have a reputation of having integrity and that sort of thing?

A Yes, sir.

Q You don't have any criticisms of her personally?

A No, sir.

It is SO STIPULATED AND AGREED on May 6, 2011.

Attorneys for Appellee, Naiel Nassar, M.D.	Attorneys for Appellant, University of Texas Southwetern Medical Center at Dallas
/s/	/s/

* * *

ORDER STAYING CASE

DKT. NO. 216, JAN. 22, 2013

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NAIEL NASSAR, MD, *Plaintiff,* v. UT SOUTHWESTERN HEALTH SYSTEMS a/k/a UNIVERSITY OF TEXAS SOUTHWESTER MEDICAL CENTER AT DALLAS, *Defendants.*	§ § § § § § § § § § § §	Civil Action No. 3:08-CV-1337-B

ORDER

Before the Court is the Notice Regarding Disposition of its Petition for Certiorari and Unopposed Motion for Extension of Order Staying Case filed by Defendant The University of Texas Southwestern Medical Center ("UT Southwestern").

In light of the United States Supreme Court's decision to grant UT Southwestern's petition for certiorari, the Court hereby **STAYS** this case pending a final resolution of the proceedings before the United States Supreme Court.

The parties are hereby **ORDERED** to inform the Court promptly following a final resolution of the matter in the United States Supreme Court.

SO ORDERED

DATED: July 27, 2010

/s/
HON. JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

PLAINTIFF'S TRIAL EXHIBIT 15

NAIEL NASSAR RESIGNATION LETTER

JULY 3, 2006

J. Gregory Fitz, MD
Donald W. Seldin Distinguished Chair
in Internal Medicine
Professor And Chairman
Department of Medicine
University of Texas Southwestern
at Dallas Medical Center
Dallas, TX

July 3, 2006

Dear Dr. Fitz:

I am resigning my position with UTSW as of September 1, 2006. I would like to stay on and help out at Amelia Court HIV Clinic till the last week of August 2006.

The primary reason of my resignation is the continuing harassment and discrimination against me by the Infectious Diseases division chief, Dr. Beth Levine. Over the past year, I have been threatened with denial of promotion, loss of salary support and potentially loss of my job. The stated reason for these threats was a lack of productivity in seeing patients. In this I have been singled out, as other faculty members with similar performances have not been subjected to similar threats. I find these accusations puzzling as I have consistently received excellent performance evaluations and have supported 100% of my salary through a contract with Parkland Health

and Hospital System. I have spoken to other physicians of Middle Eastern origin who have faced similar barriers to hiring and/or retention within the Division of Infectious Diseases. Thus I believe this behavior stems from religious, racial and cultural bias against Arabs and Muslims that has resulted in a hostile work environment.

As a consequence, I have been asked to perform additional clinical duties above and beyond those required by my contract with Parkland. Requests for coverage of my patients at Parkland are ignored. In order to meet my obligations, I have often put in full 8 hours seeing patients in the clinic and then rounded in the evening for several more hours. This is something that other faculty members are not required to do. Vacations and participation in CME events off campus, are taken as evidence by Dr. Levine that I am not working.

A secondary reason for my resignation is that Dr. Levine has violated my privacy by sharing confidential health information about me with other faculty members. This behavior is not isolated, as Dr. Levine has revealed confidential health information about other faculty members.

I also believe that Dr. Levine failed to provide leadership for the division, which lead to sagging morale, and for many clinical faculty members to resign. Dr. Levine always showed lack of interest in the clinical affairs of the division and often failed in recognizing shortages in needed clinical coverage, which negatively affected patient care. On multiple occasions Dr. Levine made statements that showed lack of respect of clinical faculty, trivialized our role

within UTSW, and described clinical faculty as a "waste of the division's budget".

Finally, I would like to thank you, Dr. Fitz, for all your support. All my interactions with you have been pleasant and positive. I believe you to be a very honorable person and you always kept your promises to me. It saddens me to have to leave the many good friends among our clinical faculty, Parkland-HIV administration and Research staff.

Sincerely;

/s/

Naiel N. Nassar, MD, FACP

cc:
Kern Wildenthal, MD
Alfred Gilman, MD
Vernon Mullen
Beth Levine, MD
CAIR-DFW Chapter.

PLAINTIFF'S TRIAL EXHIBIT 16

PARKLAND HEALTH & HOSPITAL SYSTEMS
UNSIGNED EMPLOYMENT OFFER

JULY 3, 2006

July 3, 2006
Naiel N. Nassar, M.D., FACP
5565 Preston Oaks Road
Dallas, TX 75240

Dear Dr. Nassar:

I would like to formally offer you a position as Staff Physician-Internist at HIV Services - AIDS Clinic Ryan White Grant within Parkland Health and Hospital System. This position is classified as exempt and full-time, with an hourly rate of $87.93/hour and $182,894.40 annually.

*Employee performance reviews
are conducted on an annual basis.

The Dallas County Hospital District is liable for wrongful actions of its employees to the limits set out in the Texas Tort Claims Act, currently $100,00 per individual and $300,000 per occurrence. This does not include intentional torts or gross negligence.

Employment is conditional upon satisfaction of all employment (including health and drug screening)m licensing credentialing, and privileging requirements. If this offer meets your approval, please sign and return the original of this letter to me and retain a copy for your records. This offer will

remain open for 30 days; if I have not heard from you by then, this offer will be considered rescinded.

We look forward to a tentative start date July 10, 2006. Please feel free to call Denise Morgan or myself, if further clarification is needed. We are very excited and are looking forward to working with you.

Sincerely,

/s/

Samuel L. Ross, M.D., MS
Exec. Vice President and Chief Medical Officer
Associate Dean of Clinical Affairs
UT Southwestern Medical School

Accepted:_____ Date: _____

***This letter is not a contract of employment. Parkland is an employer-at-will. This means that you and Parkland have the right to terminate the employment relationship with or without reason.**

cc: Ron J. Anderson, M.D. President & CEO

PLAINTIFF'S TRIAL EXHIBIT 19

E-MAIL FROM SAMUEL ROSS TO SYLVIA MORENO

RE: MEETING REQUEST

APR. 17, 2006

Date: Mon, 17 Apr 2006 15:56:23 0500
From: "Samuel Ross" <SROSS@parknet.pmh.org>
To: "Sylvia Moreno" <SAMORE@parknet.pmh.org>, "Naiel Nassar" <Naiel.Nassar@UTSouthwestern.edu>
Subject: Fwd: Re: Meeting Request

Yes, I talked to him about you becoming a Parkland employee and he does not support the idea.

Samuel Ross, M.D., M.S.
Executive VP\Chief Medical Officer
Parkland Health & Hospital System

>>> Naiel Nassar 4/17/2006 9:40 AM >>>

any ideas what this is about?

Naiel N. Nassar, MD, FACP

PLAINTIFF'S TRIAL EXHIBIT 26

LETTER FROM TISA JORDAN TO LILLIE WILSON

RE: PARKLANDS POSITION STATEMENT

SEPT. 22, 2006

Parkland

Health & Hospital System

September 22, 2006

Lillie Wilson, Enforcement Supervisor
U.S. Equal Employment Opportunity Commission
Dallas District Office
207 S. Houston Street, 3rd Floor
Dallas, TX 75202-4726

Dear Ms. Lillie Wilson:

I am submitting a statement of our position with respect to the allegations contained in the charge number 450-2006-02755, Naiel Nassar vs. Parkland Health & Hospital System. Mr. Nassar has alleged that he has been retaliated against for opposing and engaging in protected activity in violation of Section 704(a) Title VII of the Civil Right of 1964, as amended. Our position is that we have not retaliated against Mr. Nassar.

I will now address the allegations made by Mr. Nassar:

I. Personal Harm:

On or about August 7, 2006, I was denied employment for a Staff Physician at Parkland

C.O.P.C. in retaliation for opposing or engaging in an activity protected under Title VII.

Response: Mr. Nassar was never denied employment from any position at Parkland Health & Hospital System.

II. Respondent's Reason for Adverse Action:

I was told by Dr. Anderson, CEO of Parkland and Dr. Phillip Keiser, Medical Director of Amelia Court Clinic that Dr. Gregory Fietz [sic], Chairman of Medicine at UTSW Medical Center recommended against my employment because he was upset about my resignation letter.

Response: The above mentioned statement was not made to the Charging Party.

III. Discrimination Statement:

I believe that I have been retaliated against for opposing and engaging in protected activity in violation of Section 704(a) Title VII of the Civil Rights Act of 1964, as amended.

REQUEST FOR INFORMATION

Issue: HIRING

1. **Submit a copy of your hiring policies. If actual hiring practice is different from the written policy, describe actual practice.**

   Attachment I Employment Services Procedure Manual

   - Employment Process - Job Postings

- Employment Process - Recruitment Advertising
- Employment Process - Accepting/Distributing Applications
- Employment Process- Application/Applicant Screening
- Employment Process - Applicant Testing
- Employment Process - Reference/Group One
- Employment Process - Job Offers
- Employment Process - Processing New Hire Paperwork
- Employment Process - Reclassification Procedure

2. **Describe in detail the method(s) used by your organization to receive, screen, and process applications for employment for the position in question.**

   Attachment II - Departmental Physician Recruitment Process

   Denise Morgan, Physician Recruiter, reviews applications and pre-screens applicants for the purpose of selecting an applicant. Sylvia Moreno, Director of Nursing -AIDS Center, is the hiring manager for the position in question and conducts interviews.

3. **Provide the total number of applications received for the position in question during the relevant period.**

   There were three Curriculum Vitae received for the position in question during the relevant period.

4. **State whether the Charging Party applied for the position in question during the relevant period.**

   a. the date of and the nature of application, whether written or oral

   The Charging Party submitted a Curriculum Vita [sic] via the Parkland career website on June 20, 2006.

   b. a copy of the application and/or resume filed by the Charging Party and/or any other notation made during the processing of the Charging Party's application.

   See Attachment III - Curriculum Vitae and Emails

   c. the exact job title and job grade or wage level sought by the Charging Party.

Job Title	Job Grade	Salary
Staff Physician Internist	44	$182,894

5. **State whether the Charging Party was considered for the position. The Charging Party was considered for the position.**

   The Charging Party was considered for the position in question.

6. **State whether the position in question was filled during the relevant period.**

   To date the position is still an open position.

7. **State each and every reason why the Charging Party was not selected for the position in question. Provide any written**

documents which reflect the bases of the decision not to select the Charging Party. For each person involved in the decision not to select the Charging Party, list their name, position.

The Charging Party was verbally offered the position in question on July 3, 2006, by Denise Morgan, Physician Recruiter. The offer letter for the Charging Party was drafted and submitted to Dr. Samuel Ross, Chief Medical Officer, for approval on July 5, 2006. Ms. Morgan was informed by Dr. Ross that he would need to confer with a Dr. J. Gregory Fietz [sic] of UT Southwestern before approving the offer fetter. Ms. Morgan was contacted by the Charging Party on or about July 6, 2006 to discuss the status of his offer letter. She informed him that she was waiting to receive the signed copy from Dr. Ross. Ms. Morgan did not have any other communications with the Charging Party. During the month of July, Dr. Ross was exiting Parkland Health & Hospital System. His last date of employment was August 1, 2006. The week of July 20, 2006, Kim Akinwande, Associate Director, Medical Staff, met with Dr. Ross to bring to a close all outstanding items, including the Charging Party's offer status. Ms. Akinwande was informed that the Charging Party accepted another position in California. There was never a decision made not to select the Charging Party.

8. **State each and every reason why you contend the person(s) selected for the**

position was/were selected instead of the Charging Party. Provide any written documents, which reflect the bases of your decision to select those persons, who were hired into the position. list all persons hired during the relevant period, including name, hire date, position applied for, position hired during the relevant period, including name, hire date, position applied for, position hired to.

To date no candidate has been selected for the position in question.

Issue: RETALIATION

1. **List by name, and position all officials of your organization who have been informed of, or knew of all the allegations of discrimination made by the Charging Party, if any. For each person listed, state the date such notification was received, the nature of the notification, and the person's response to it. Submit all documents which state, describe, reference, or relate to the notification of the Charging Party's complaint.**

   The week of July 10, 2006, Dr. Samuel Ross, Chief Medical Officer, contacted Dr. J. Gregory Fietz [sic] to discuss the claimant and his potential hire by Parkland Health & Hospital System. Dr. Fietz [sic] informed Dr. Ross that the Charging Party made allegations against Dr. Levine and asked that Dr. Ross give him an opportunity to look into the matter. Dr. Ross was

not able to obtain the needed agreement from UT Southwestern to hire the Charging Party prior to being notified that the Charging Party accepted another position in California.

Dr. Ron Anderson, C.E.O, was made aware of the allegations of discrimination on August 7, 2006 in a meeting with the Charging Party.

2. **Describe any personnel action(s) involving the Charging Party taken after the earliest date any person in your organization had knowledge of Charging Party's allegation(s) of discrimination. Submit all documents which state, describe, reference, or relate to these personnel actions.**

   No personnel actions have been taken against the Charging Party by Parkland Health & Hospital System. The employee is an employee of UT Southwestern.

Response: In accordance with Parkland Health & Hospital System Human Resources Procedure, 6000-3100 - Harassment/Retaliation, the purpose to ensure that all employees have the right to work in an environment free from all forms of harassment and/or retaliation by other employees, regardless of their working relationship, as well as patients, affiliate institutions, or vendors. Parkland Health & Hospital System (PHHS) will not tolerate harassment of or retaliation against a patient or vendor by any employee. This includes harassment of any nature, or any adverse action taken against individuals who have opposed unlawful practices; participated in legal/regulatory proceedings, or

requested accommodations related to employment discrimination based on age, race, color, religion, gender, sexual orientation, disability, national origin, or veteran status.

The Charging party was not denied employment in retaliation for engaging in protected activity. During the hiring process it was necessary to obtain agreement from UT Southwestern to hire the Charging Party. While waiting for such an agreement, the Charging Party chose to accept another position.

Should you have any questions, please feel free to contact me at (214) 590-8060.

Sincerely,

/s/

Tisa Jordan
Employee Relations Specialist II
Parkland Health & Hospital System

PLAINTIFF'S TRIAL EXHIBIT 50A

E-MAIL FROM HENRIETTA MORGAN TO SYLVIA MORENO

RE: HIV PHYSICIAN FACULTY

MAY 31, 2006

From: HENRIETTA MORGAN
To: MORENO, SYLVIA
Date: 5/31/2006 5:48:34 PM
Subject: Re: HIV Physician Faculty

Syvia [sic]

Please call me in reference to the salary for Dr. Nasser [sic]. He countered the offer you ask me to make, which was midpoint 80.72/hr = 167,897.60. He's asking for 87.93/hr = 182,894.40. He has over 15yrs experience with that said it's definitely within the range. Let me know so we can proceed. Thanks D

Denise Morgan, CPCS
Physician Recruitment Coordinator
Medical Staff Services -MC 7746
(214) 590-1547 fax: (214) 590-0024
email: HDMORG@parknet.pmh.org

* * *

>>> SYLVIA MORENO 5/15/2006 3:12 PM >>>

* * *

PLAINTIFF'S TRIAL EXHIBIT 52A

E-MAIL FROM HENRIETTA MORGAN TO SYLVIA MORENO

RE: DR. NASSAR

JULY 3, 2006

[Handwritten Note]
Claudia Need this done by 1200.
/s/ Sylvia
Deliver to Denise Morgan
/s/ Sylvia

From: HENRIETTA MORGAN
To: MORENO, SYLVIA
Date: 7/3/2006 10:07:28 AM
Subject: Re: Dr. Nassar

We are planning for everything to be in place by this date. Dr. Ross will be here on Wednesday and he can sign off on the offer letter, however I still need Dr. Nassar to complete the employment paperwork and go through occupational health, drug screening, Group One etc. It's going to be a push, however we can possible make it work. I will also need a completed and signed HR Action form with the following:

Job Title: Staff Physician -Internist

Job Code: P252

Status: FT

Hrly: 87.93

New Hire Checklist (top portion) completed and signed

EEO Information Report

Thanks D

Denise Morgan, CPCS
Physician Recruitment Coordinator
Medical Staff Services -MC 7746
(214) 590-1547 fax: (214) 590-0024
email: HDMORG@parknet.pmh.org

* * *

>>> SYLVIA MORENO 7/1/2006 4:30PM >>>

Denice, [sic]

Did we get the letter of offer out to Dr. Nassar? If we cannot get him to start on July 10, we are going to have critical staffing issues. Please let me know if there is anything I can do to help.

Thank you,

Sylvia

* * *

[Alternations hand written]

PLAINTIFF'S TRIAL EXHIBIT 54A

ADMINISTRATIVE EXCEPTION REQUEST FORM

Administrative Exception Request Form

Please complete this form indication the job titles impacted by this exception request. Please have form signed in order of signature lines.

Job Code: P254

Job Title: Staff Physician - Internist

Reason for Exception: (attach resume and other applicable information) Naiel Nassar, M.D., FACP

Dr. Nassar comes to us with thirteen years of experience. He is Fellowship trained and double Boarded in Internal and Infectious Dicease [sic]. He's been working in the PHHS HIV/AIDS Department as an Associate Medical Director and an Assistant Professor of Medicine for the last five years with UT Southwestern. We feel with the vast amount of experience Dr. Nassar brings to PHHS as well as the department, 87.93/hr = 182,894.40 which is over the midpoint of the salary range, is deserving.

/s/	1908	7/4/06
Director Signature	ID#	Date
/s/	8229	7/5/06
Divisions Vice President RANDY BLANCHARD	ID#	Date

* * *

PLAINTIFF'S TRIAL EXHIBIT 54B

PARKLAND HEALTH & HOSPITAL SYSTEM
HR RECORDS ACTION FORM

JULY 5, 2006

PARKLAND HEALTH & HOSPITAL SYSTEM					
[ ]Rehire During Current Year [ ]Rehire	**HR RECORDS ACTION FORM** **7/5/06** DATE			[X]Employment [ ]Rate Change [ ]Reclassification [ ]Leave of Absence [ ]Termination	
Employee Number	Employee Name. Last First Middle **Nassar Naiel N.**				
DEPARTMENT NAME **HIV Services - Ryan White Grant**	DEPT. NUMBER **4800**	EFFECTIVE DATE **7/10/06**			
New Hire for Present Status	Job Title	Job Title Code	Position Status	Rate hourly	Salary Grade
	Staff Physician - Internist	**P252**	**FT**	**87.93**	**44**
* * *					

	Approved:	Date	
		7	5
	/s/ Sylvia Moreno, RN	Mo.	Day
	Department Director: **1908** **/25529**		
	Department Director ID #		Ext. #

PLAINTIFF'S TRIAL EXHIBIT 54D

EMAIL FROM RANDY BLANCHARD TO SYLVIA MORENO

RE: DR. NASSAR - CLARIFICATION

JULY 10, 2006

From: RANDY BLANCHARD
To: MORENO SYLVIA
Date: 7/10/06 2:46:33 PM
Subject: Re: Fwd: Nr Nassar - clarification

Have him sit tight; being addressed

>>> SYLVIA MORENO 7/6/0611 :36 AM >>>

We need to get this addressed asap. This is only fueling anxiety for staff. Have you heard anything from Dr. Ross?

* * *

DEFENSE TRIAL EXHIBIT 8

LETTER FROM BETH LEVINE TO J. GREGORY FITZ

RE: NAIEL NASSAR, M.D.

DEC. 16, 2005

THE UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER AT DALLAS

Department of Medicine

Beth Levine, M.D.
Jay P. Sanford Professor
in Infectious Disease
Professor of Internal
Medicine and Microbiology
Chief, Division of Infectious
Diseases

December 16, 2005

J. Gregory Fitz, M.D.
Professor and Chairman
Department of Internal Medicine
UT Southwestern Medical Center
5323 Hairy Hines Blvd
Dallas, TX 75390-9030

Re: Naiel Nassar, M.D.

Dear Dr. Fitz:

I am writing to recommend Dr. Naiel Nassar for promotion to Associate Professor of Internal Medicine on the Clinician Track. Dr. Nassar was Assistant Professor of Medicine in the Division of Infectious

Diseases at UT Southwestern from 7/95-12/98 (serving as Director of the HIV program at the Dallas VA Medical Center) and returned to UTSW in 11/01, where he has since served as Assistant Professor of Internal Medicine and Associate Medical Director of the HIV/AIDS Department at Parkland Health and Hospital System. Dr. Nassar has been an Assistant Professor at UTSW for 7 1/2 years, and he also was an Assistant Professor of Clinical Medicine at the University of California Davis Medical Center for approximately 3 years. He is an outstanding clinician whose accomplishments in clinical medicine far exceed his rank of Assistant Professor; as is apparent from his CV and the duration and quality of his clinical service to UT Southwestern, his promotion to Associate Professor is overdue.

Dr. Nassar is one of the strongest clinicians in the Division of Infectious Diseases at UT Southwestern. His primary interests are the treatment of HIV infection and the appropriate use of antimicrobial agents. He assumes important leadership roles in each of these areas; he is Associate Medical Director of the Parkland HIV Clinic and Chair of the Antibiotic Subcommittee of Parkland Hospital Pharmacy & Therapeutics. Because of his international experience in medicine in the Middle East, he has also developed an interest in infections in travelers. As a result of Dr. Nassar's clinical excellence in general Infectious Diseases, HIV medicine, antibiotic usage, and infections in travelers, he has become a highly regarded expert in these areas whose opinion is strongly valued by bother Infectious Diseases experts and general Internists.

Dr. Nassar spends the majority of his time in clinical activities and patient care. He treats patients in the mv clinic 4 days per week. He attends on the Infectious Diseases Consult service an average of 6 weeks per year and. on the Internal Medicine service 4-6 weeks per year. Overall, Dr. Nassar spends over 90 percent of his time treating patients and supervising residents and students.

Dr. Nassar has an active role in teaching within the university. He lectures in the Medical Microbiology course and routinely lectures Internal Medicine Residents on the treatment of HIV infection and use of antimicrobial agents. He also is active in the training of Infectious Diseases fellows, both by lecturing in the core curriculum lecture series and by bedside teaching as part of the Infectious Diseases Consult service. Dr. Nassar is an active participant in the Infectious Diseases clinical case conference series, providing valuable insights into patient care. His clinical knowledge is quite broad and he is often able to make difficult diagnoses that have-not been noted by other faculty members. His ratings by the Internal Medicine housestaff are strong, with an overall ranking of 4.59 in the Core Competencies (range 1-5; 4.59 is approximately 90th percentile among all subspecialties in Internal Medicine).

Dr. Nassar is a highly desirable speaker at CME events around the US and in the Middle East. He has lectured on widely diverse topics including the treatment of HIV infection and its related complications, the treatment of infections in travelers, and the use of antibiotics in respiratory tract infections. Dr. Nassar has been an invited.

speaker for Medical Grand Rounds at the University of California at Davis, St. Louis University, the University of Texas Medical Branch at Galveston, as well as at UT Southwestern Medical Center. Dr. Nassar also participates in Statewide CME events including the UT Southwestern HIV Update, the CDC-sponsored Sexually Transmitted Diseases Training Course, and the general meeting of the Texas Infectious Diseases Society. Dr. Nassar has a very engaging speaking style that invites numerous questions and discussion by the audience. He is usually rated as an excellent speaker and is frequently invited back .for educational events.

Dr. Nassar plays an important role in the Texas Oklahoma AIDS Education and Training Center (AETC). He has been the primary author and is the current principal editor of the Parkland Pocket Guide for HIV Care. This guide is the basis for the AETC's curriculum and is used for training health care providers throughout the region. The Parkland Pocket Guide has become extremely popular; over 50,000 copies have been distributed in the US and worldwide since its first publication. In addition to this effort, Dr. Nassar acts as a preceptor for AETC trainees at the Parkland HIV Clinic and participates in the yearly faculty development conference sponsored by the AETC.

Dr. Nassar also has a record of administrative service. As noted above, he is the Associate Medical Director of the Parkland HIV/AIDS Clinic. This clinic is one of the largest HIV care facilities in the nation, providing care to approximately 5000 active patients. As Associate Medical Director, he plays a leadership

role in the clinic and participates in important management decisions. He is also a member of the HIV performance Improvement Committee for Parkland. Dr. Nassar has served for several years on the Pharmacy and Therapeutics, and because of his expertise in cost-effective antibiotic usage, was recently appointed as Chair of the Antibiotic Subcommittee of the Parkland Pharmacy and Therapeutics Committee.

Dr. Nassar also has a strong interest in HIV clinical research. He is an investigator for the UT Southwestern AIDS Clinical Trials Unit. This unit is part of an NIH-sponsored network that investigates key questions regarding the pathogenesis and treatment of HIV and its related infections. He regularly enrolls patients into clinical trials and acts as the local principal investigator on these network trials. He also participates in observational studies using the Parkland HIV database. These studies have resulted in numerous presentations at national and international conferences and in peer-reviewed journal articles. In addition, Dr. Nassar has acted as a PI on several industry-sponsored studies of HIV infection.

In summary, Dr. Nassar is an excellent academic Infectious Diseases clinician who strongly deserves promotion to Associate Professor of Internal Medicine on the clinician track. He is an outstanding physician who is highly regarded by peers and students; he is an excellent teacher both within and outside the university; he serves important administrative leadership roles in the Parkland HIV/AIDS program and the Parkland Pharmacy; and he actively

contributes to our large successful HIV clinical research program. Based on his significant achievements and contributions to UT Southwestern as a clinician, educator, administrator, and clinical researcher, he has .my enthusiastic support for promotion to the rank of Associate Professor.

Sincerely,

/s/

Beth Levine, M.D.

DEFENSE TRIAL EXHIBIT 10

LETTER FROM J. GREGORY FITZ TO ALFRED G. GILMAN

RE: NAIEL NASSAR, M.D. NOMINATION FOR PROMOTION TO ASSOCIATE PROFESSOR

DEC. 30, 2005

THE UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER AT DALLAS

Department of Internal Medicine

J. Gregory Fitz, M.D.
Donald W. Seldin Distinguished
Chair in Internal Medicine
Department Chair

December 16, 2005

Alfred Gilman, M.D., Ph.D.
Dean, Southwestern Medical School
Mail Code 9003

Re: Naiel Nassar, M.D.
Nomination for Promotion to Associate Professor

Dear Dr. Gilman:

I am writing to recommend with enthusiasm the promotion of Naiel Nassar, M.D. from Assistant Professor to Associate Professor of Internal Medicine on the Clinician Track. Dr. Nassar is one of the leading clinicians in our busy HIV service and serves as the Associate Director of the HIV/AIDS Department at Parkland Health and Hospital System. He has played an instrumental role on the

growth of this busy and demanding clinical and academic practice to one of the largest and best in the country.

Dr. Nassar attended medical school and performed his initial residency training gin Egypt. Subsequently, he developed a strong interest in the emerging epidemic of HIV, and moved to California to work at the clinic for AIDS in Sacramento, CA. Soon after, he elected to perform an additional residency in this country, and then returned to California for fellowship training in Infectious Diseases. He first jointed our faculty as an Assistant Professor of Internal Medicine in the Division of Infectious Diseases at UT Southwestern in 1995, and served as the Director of the HIV program at our VA hospital until 1998. After several years elsewhere, he returned to UT Southwestern in 2001 and has been clinically very active as the Associate medical Director of the HIV/AIDS Department at Parkland Health and Hospital System. Thus, Dr. Nassar has been as an Assistant Professor at UT Southwestern for 7 1/2 years, and also served as an Assistant Professor at the University of California Davis Medical Center for an additional three years. As a member of our Infectious Diseases Division, De. Beth Levine feels that he is an outstanding clinician whose accomplishments in clinical medicine are exceptional. Based on the duration and quality of his clinical service to UT Southwestern, his promotion to Associate Professor is well deserved.

Dr. Nassar is one of the strongest clinicians in the Division of Infectious Diseases at UT Southwestern: we rate his clinical accomplishments as outstanding.

His Primary interest focus in the treatment of HIV infection and the appropriate use of antimicrobial agents. He has emerged as an important leader in each of these areas; he is Associate Medical Director of the Parkland HIV Clinic and Chair of the Antibiotic Subcommittee of Parkland Hospital Pharmacy & Therapeutics. Because of his international experience in medicine in the Middle East, he has also developed an interest in infections in travelers. As a result of Dr. Nassar's clinical excellence in general Infectious Diseases, HIV medicine, antibiotic usage, and infections in travelers, he has become a highly regarded expert in these areas whose opinion is strongly valued by both Infectious Diseases experts and general Internists.

Dr. Nassar spends the majority of his time in clinical activities and patient care. He treats patients in the HIV clinic 4 days per week. He attends on the Infectious Diseases Consult service an average of 6 weeks per year and on the Internal Medicine service 4-6 weeks per year. Overall, Dr. Nassar spends over 90 percent of his time treating patients and supervising residents and students.

Dr. Nassar has an active role in teaching within the university. He lectures in the Medical Microbiology course and routinely lectures Internal Medicine residents no the treatments of HIV infection and use of antimicrobial agents. He also is active in the training of Infectious Diseases fellows, both by lecturing in the core curriculum lecture series and by bedside teaching as part of the Infectious Diseases Consult service. Dr. Nassar is an active participant in the Infectious Diseases clinical case conference

series, providing valuable insights into patient care. His clinical knowledge is quite broad and he is often able to make difficult diagnoses that have not been noted by other faculty members. his ratings by the Internal Medicine housestaff are strong, with an overall ranking of 4.59 in the Core Competencies (range 1-5; n=11; 4.59 is approximately the 90th percentile among all subspecialties in Internal Medicine). Narrative comments from residents note that he is "an outstanding physician and teacher"; "an ideal attending"; and "great attending!" Thus, we rate his resident and student teaching as excellent to outstanding as well.

Dr. Nassar is, in addition, a highly desirable speaker at CME events around the US and in the Middle East. He has lectured on diverse topics including the treatment of HIV infection and its related complications, the treatment of infections in travelers, and the use of antibiotics in respiratory tract infections. Dr. Nassar has been an invited speaker for Medical Grand Rounds at the University of California at Davis, St Louis University, the University of Texas Medical Brand at Galveston, as well as the UT Southwestern medical Center. Dr. Nassar also participates in statewide CME events including the UT Southwestern HIV Update, the CDC-sponsored Sexually Transmitted Diseases Training Course, and the general meeting of the Texas Infectious Diseases Society. Dr. Nassar has a very engaging speaking style that invites numerous questions and discussion by the audience. He is usually rated an excellent speaker and is frequently invited back for educational events.

Dr. Nassar plays an important role in Texas Oklahoma AIDS Education and Training Center (AETC). He has been the primary author and is the current principal; editor of the Parkland Pocket Guide for HIV Care. This guide is the basis for the AETC's curriculum and is used for training health care providers throughout the region. The Parkland Pocket Guide has become extremely popular; over 50,000 copies have been distributed in the US and worldwide since its first publication. In addition to the effort, Dr. Nassar acts as a preceptor for AETC trainees at the Parkland HIV Clinic and participates in the yearly faculty development conference sponsored by the AETC.

Dr. Nassar also has a record of important administrative service. As noted above, he is the Associate Medical Director of the Parkland HIV/AIDS Clinic. This clinic is one of the largest HIV care facilities in the nation, providing care to approximately 5000 active patients. As Associate Medical Director, he plays a leadership role in the clinic and participates in important management decisions. He is also a member of the HIV Performance Improvement Committee for Parkland. Dr. Nassar has served for several years on the Pharmacy and Therapeutics, and because if his expertise in cost-effective antibiotic usage, was recently appointed as Chair of the Antibiotic Subcommittee of the Parkland Pharmacy and Therapeutics Committee.

Importantly, Dr. Nassar has maintained a strong interest in HIV clinical research. He is an investigator for the UR Southwestern AIDS Clinical

Trials Unit. This unit is part of an NIH-sponsored network that investigates key questions regarding the pathogenesis and treatment of HIV and its related infections. He regularly enrolls patients into clinical trials and acts as the local principal investigator on these network trials. He also participates in observational studies using the Parkland HIV database. These studies have resulted in numerous presentations at national and international conferences and in peer-reviewed journal articles. In addition, Dr. Nassar has acted as PI on several industry-sponsored studies of HIV infection.

In summary, we are delighted to have Dr. Nassar as a member of our faculty. He plays a very important role at UT Southwestern as an outstanding physician who is highly regarded by peers and students; an excellent teacher both within and outside the university and an effective administrator in the Parkland HIV/AIDS program and the Parkland Pharmacy. Moreover, he is one of the key factors responsible for the success of the HIV clinical and research programs. Based on these accomplishments, he has the enthusiastic support of the Department for promotion to the rank of Associate Professor with great confidence that he will continue to be an important leader of these many efforts.

Sincerely,

/s/
J. Gregory Fitz
Donald W. Seldin Distinguished Chair in Internal Medicine
Chairman, Department of Internal Medicine

DEFENSE TRIAL EXHIBIT 11

LETTER FROM ALFRED G. GILMAN TO J. GREGORY FITZ

MAR. 2, 2006

THE UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER AT DALLAS

Alfred G. Gilman, M.D., PhD.
Dean, UT Southwestern Medical School
Regental Professor of Pharmacology
Director, Cecil H. and Ida Green
Comprehensive Center for Molecular,
Computational and Systems Biology

Nadine and Torn Craddick Distinguished
Chair in Medical Science
Raymond Willie and Ellen Willie
Distinguished Chair in
Molecular Neuropharmacology,
in Honor of Harold B. Crasilneck, Ph.D.
Atticus James Gill, M.D., Chair in Medical Science

March 2, 2006

J. Gregory Fitz, M.D.
Professor and Chair
Department of Internal Medicine
MC 9030

Dear Greg,

At its meeting of March 1, 2006, the Promotion and Tenure Committee voted to recommend the promotion of Naiel N. Nassar, M.D. to the rank of

Associate Professor, Department of Internal Medicine (clinician track).

I concur in their recommendation and will ask the Board of Regents to approve the promotion, effective September 1, 2006.

Sincerely,

/s/

Alfred G. Gilman, M.D., Ph.D.

DEFENSE TRIAL EXHIBIT 14

E-MAIL FROM SYLVIA MORENO TO NAIEL NASSAR

RE: AMELIA

APR. 27, 2006

Date: Thu, 27 Apr 2006 21:55:16 -0500
From: "Sylvia Moreno" <SAMORE@parknet.pmh.org>
To: "Naiel Nassar"
<Naiel.Nassar@UTSouthwestern.edu>
Subject: Fwd: Amelia

Naiel,

Nothing appears to have changed from the previous communication. If you resign from UTSW, you would not be UT Faculty and no reason for Parkland not to employ you. Dr. Ross sent me Dr. Fitz's e-mail. I need to know your thoughts about this e-mail.

Sylvia

* * *

>>> Greg Fitz 04/27/06 6:35 PM >>>

i) As per our last meeting a month or so ago, I met today with Naiel Nassar about proportioning his salary from 100% Ryan White to 90% Ryan White: 10% Departmental. After a long discussion, he understands and agrees. His reticence before had more to do with a desire to be a Parkland employee, which we can discuss another time. As per discussion, it would be against our operating agreement with Parkland to have them employ

faculty directly, so we cannot go there. He is OK with this.

ii) he did raise a point that Phil raised in our meeting - one of the difficulties in operating Amelia Court is that the clinics are staffed by faculty and others from any different Departments. It would be good to have them report operationally to Phil. Phil raised this earlier in our meeting, and I agree. How do we make this happen?

Thanks

Greg

DEFENSE TRIAL EXHIBIT 15

AGREEMENT BETWEEN THE BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM AND THE BOARD OF MANAGERS OF THE DALLAS COUNTY HOSPITAL DISTRICT

FEB. 9, 1979

THIS AGREEMENT MADE the 9th day of February, 1979, by and between the BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM ("Regents"),; for and on behalf of The University of Texas Health Science Center at Dallas ("Center"), a component of The University of Texas System, and the BOARD OF MANAGER OF THE DALLAS COUNTY HOSPITAL DISTRICT ("District"), owner and operator of the Dallas Hospital District System, WITNESSETH:

WHEREAS, District is a public body created and existing under the laws of the State of Texas to operate a public hospital for Dallas County, Texas, to supply hospital medical care primarily for indigent and needy citizens of Dallas County, Texas, and to aid in improving the public health as well as medical science and medical education, as provided by law; and

WHEREAS, Regents operate Center which includes a school of medicine, graduate school, and school of allied health sciences, for the education of physicians and other health care professionals, and for research and other activities incident's the operation of said schools; and

WHEREAS, it is the desire of District to obtain the advantages of professional medical services and research by the faculties and staffs of the Center's medical school, graduate school, and allied health sciences school, for the benefit of the injured and sick cared for by District; and

WHEREAS, Regents desire the opportunity for clinical teaching and research at District facilities, including Parkland Memorial Hospital ("Parkland"), for students and faculty of Center under conditions of actual responsibility for patient core; and.

WHEREAS, through a long period of actual experience it has been clearly demonstrated that a proper quality of care and treatment of patients of District and a significant benefit to the teaching and research programs of Center have resulted from close affiliation and integration of activities and functioning of District institutions as teaching hospitals; and

WHEREAS, the parties now desire to extend and improve this mutually advantageous affiliation;

NOW, THEREFORE, in consideration of the premises and of the benefits derived and to be derived therefrom, REGENTS and DISTRICT, for purposed of achieving the above described objectives of said parties, agree as follows:

A. RESPONSIBILITIES OF PARTIES

1. District shall provide for the operation and maintenance of a fully accredited non-sectarian hospital system, including PARKLAND, as prescribed by the laws of the State of Texas and shall

made said system available to Center pursuant to the terms of this Agreement.

2. For purposed of this Agreement, the responsibilities of the Board of Manager with respect to DISTRICT affairs include:

a. Approval of the by-laws of the Board of Managers, the by-laws of the Medical Staff of PARKLAND and other DISTRICT health care facilities ("Medical Staff")

b. Appointment of a hospital administrator to serve as Chief Executive Officer of DISTRICT ("CEO");

c. Annual appointment . of Medical Staff upon recommendation of Medical Staff concurred in by the dean of the Center Medical School and CEO;

d. Appointment of all categories of House Staff of PARKLAND and other DISTRICT health care facilities ("House Staff") upon recommendation of the chief of the appropriate service, the Medical Advisory Council, and CEO;

e. Planning for expansion of DISTRICT'S physical facilities and services, provided however that planning shall be done in consultation with Center and Medical Staff.

f. DISTRICT budgetary and fiscal matters subject to approval of the Commissioners Court of Dallas County, as provided by the laws of the State of Texas;

g. Defining the DISTRICT'S needs for a sufficient number of qualified physicians to adequately provide, direct and supervise physician medical services to all inpatients and outpatients of Parkland Memorial Hospital and other health care facilities of DISTRICT;

h. Appointment as chiefs of departments, divisions and services of Medical Staff, the physicians who are chairmen or chiefs of the corresponding departments or divisions of Center medical school, said appointments to be made upon the recommendation of the President of Center or his designees and CEO;

i. Determining and paying salaries, stipends, and appropriate fringe benefits of appointed House staff except under Special Circumstances as approved by the Board of Managers.

3. Regents through Center shall provide for the maintenance and operation of a fully accredited and non-sectarian educational institution, including a medical school, graduate school, and school of allied health sciences as prescribed by the laws of the State of Texas, and shall make said schools available to District pursuant to the terms of this Agreement.

4. For purposes of this Agreement, the responsibilities of Regents include:

a. Governance and management of Center pursuant to the laws of the State of Texas, including budgetary and fiscal matters;

b. Appointment of administrative officers and faculty of Center;

c. Supplying a sufficient number of qualified physicians who are member of Center faculty to adequately provide, direct and supervise physician medical services to all inpatients and outpatients of Parkland Memorial Hospital and other District health care facilities, subject to Paragraph 3 of the General Provisions of this Agreement hereinafter set forth. Total physician patient care will be provided, directed, and supervised by faculty of Center to patients of District. District house staff will participate in patient care under the direction of the Medical Staff;

d. Enforcement of the bylaws of the Medical Staff through administration of Center;

e. Encouraging fulltime faculty of Center to utilize DISTRICT facilities for the needs of all private patients, including inpatients, outpatients and emergency room patients to the extent that services and facilities are available;

f. Notification of District CEO to the nature and extent of educational service and research programs at facilities not owned and operated by DISTRICT. Regents will give priority to DISTRICT facilities for any new or expanded programs to be operated by Center where such facilities are adequate and appropriate for such use.

B. GENERAL PROVISIONS

1. Joint Conference Committee of Parkland Memorial Hospital. The Joint Conference Committee ("JCC") shall function as liaison between the Board of Manager of DISTRICT and the Medical Staff and the composition and operation of said Committee shall be governed by the Medical Staff bylaws as they may be amended from time to time. Under Current bylaws (a) said Committee shall consist of three member at large of the Medical Staff nominated by the president of the Medical Staff and chairman of the Medical Advisory Council and elected by the Medical Advisory Council, and the chairman of the Medical Advisory Council; (b) in the event that one of these Medical Staff members should be elected to dual positions, the vice president of the Medical Staff shall serve as the third Medical Staff representative; (c) the administrator of DISTRICT and the dean of the Center medical school, or their designees, shall be ex-officio members of the Committee; and (d) the JCC shall meet no less often than quarterly and will meet more often at the direction of the JCC chairman or at the request of two member.

2. Joint Administrative Affairs Committee. The Joint Administrative Affairs Committee ("JAAC") shall consider fiscal and administrative matters which have not been resolved by the CEO of DISTRICT and president of Center and shall make recommendation regarding with matters to the Board of Manager of District and Regents. The Committee shall consist of CEO of DISTRICT, the Chairman of the Board of Manager of DISTRICT, one other member of the Board of Managers, President of

Center, Vice Chancellor for Health Affairs of The University of Texas System, and one Regent of the University of Texas.

3. Compensation will be paid by DISTRICT to Center for certain categories of documented professional services which must be rendered in the regular operation of any accredited hospital but which may be of little value or direct benefit to the educational or research activities of Center. Annually, the President of Center and CEO of DISTRICT will agree in advance on a list of such services and the personnel rendering such services, provided however, that in the event that an agreement cannot be reached between said officers, those unresolved issues will be referred to the Joint Administrative Affairs Committee for consideration and resolution or referral to the respective governing bodies. In no event shall the aggregate cost of such services exceed the amount at which DISTRICT could contract with other entities for the same services of comparable quality provided, further, in determining the aggregate amount of such compensation, consideration shall be given to service provided by the DISTRICT at the request of Center for the exclusive benefit of the educational mission of Center.

4. Decisions regarding undergraduate teaching and medical research programs which are to be carried out in DISTRICT facilities o which affect DISTRICT, including the assignment of students in DISTRICT hospitals, will be made by the President of Center or his designee and the CEO of DISTRICT.

5. DISTRICT and Center shall create a position to be known as "Director of Medical Affairs at Parkland Memorial Hospital/Associate Dean for Clinical Affairs — Parkland Memorial Hospital at the Center Medical School." ("Director of Medical Affairs"). The Director of Medical Affairs shall be an experience, licensed physician, whose salary shall be funded jointly by DISTRICT and Center in amount to be determined annually by CEO and President of Center. In his capacity of Director of Medical Affairs, he shall be responsible to Chief Executive Officer of PMH, and as Associate Dean for Clinical Affairs — Parkland Hospital, he shall be responsible to [unreadable text] of SWMS.

6. Consultation among DISTRICT CEO, the President of Center and/or the deans of the Center schools, shall be held on all matters where the operations of one party affect the operations of the other party.

7. Disclosure of fees and costs. Financial data involving joint programs within DISTRICT facilities will be made available on request by either the CEO or President of Center. Requests by such officers of each institution for data they believe necessary in connection with joint programs and/or shared salaries will be in writing, stating the purpose for which the information is needed and the planned utilization. Each officer furnishing such data will be afforded the opportunity to explain the contents of the data in order to avoid any misinterpretations of the contents.

8. Nothing in this agreement shall affect or prohibit subsequent agreements between the parties

for joint employment and pro-rata apportionment of salaries and other related costs and expenditures.

9. Parties recognize and shall adhere to overlapping responsibilities in the discharge of institutional duties of faculty and Medical Staff members created by the dual responsibility of faculty membership at Center and appointment to the DISTRICT Medical Staff.

10. The CEO, the Dean of the Center medical school, and the Director of Medical Affairs shall be appointed ex-officio members of the Medical Advisory Council, as currently constituted in the Medical Staff by-law.

11. The CEO shall be appointed ex-officio member of the Faculty Council of Center medical school.

12. Center grants or research projects involving participation by DISTRICT must have prior written approval by CEO indicating DISTRICTS ability to participate in such grants or research projects.

13. All notices under this Agreement shall be provided to the party to be notified in writing, either by personal delivery or by Unites States mail. All notices under this Agreement shall be deemed given to a party when received by such party's designated representative.

14. All the agreements between the parties on the subject matter hereof have been reduced to writing herein. No amendments to this Agreement shall be valid unless in writing and signed by the duly authorized representatives of both parties, and

approved by the Regents and the Board of Managers of DISTRICT.

15. No oral representations of any officer, agent, or employee of DISTRICT or The University of Texas System, or any of its components institutions, either before or after the effective date of this Agreement, shall affect or modify any obligations of either party hereunder.

16. This Agreement shall be binding on and shall inure to the benefit of the parties and their respective successors and assignees; provided, however, that no assignment by the either arty shall be effective without prior written approval of the other party. A delay in or failure of performance of either party shall not constitute default hereunder, or give rise to any claim for damages, if and to the extent such delay or failure is caused by occurrences beyond the control of either party.

17. This Agreement shall become effective upon approval and execution by Regents and the Board of Managers. If so approved and executed this Agreement shall continue in effect for an initial term ending five(5) years after the date and year first above written, and after such initial term, from year to year unless one party shall have given one (1) year's prior written notice to the other pry of intention to terminate this Agreement. If such notice is given, this Agreement shall terminate one (1) year after such notice is given.

Executed by University and DISTRICT on the day and year first above written. In duplicate copies, each of which shall be deemed an original.

ATTEST:
/s
Secretary Board of Regents of The University of Texas System
Betty Anne Thedford

UNIVERSITY:
BY /s/
Chairman, Board of Regents of The University of Texas System
Allen Shivers

/s/
President, The University of Texas Health Science Center at Dallas

FORM APPROVED
/s/
General Counsel of the System

CONTENT APPROVED
/s/
Chancellor of the System

ATTEST:
/s/
Secretary, Board of Managers of the Dallas County Hospital District

/s/
Vice Chancellor for Health Affairs

FORM APPROVED
/s/
Legal Advisor for District

BOARD OF MANAGERS, DALLAS COUNTY HOSPITAL
/s/
Chairman, Board of Managers of the Dallas County Hospital District

/s/
Chief Executive Officer, Dallas County Hospital District

DEFENSE TRIAL EXHIBIT 16

MASTER AFFILIATION AGREEMENT BETWEEN DALLAS COUNTY HOSPITAL DISTRICT AND THE UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER AT DALLAS

JUNE 29, 2006

MASTER AFFILIATION AGREEMENT BETWEEN DALLAS COUNTY HOSPITAL DISTRICT AND THE UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER AT DALLAS

INTRODUCTION

THIS MASTER AFFILIATION AGREEMENT ("Agreement") is made and entered into this 29th day of June, 2006 between **DALLAS COUNTY HOSPITAL DISTRICT**, a political subdivision of the State of Texas ("DCHD") which operates Parkland Health and Hospital System ("Parkland") and of which Parkland Memorial Hospital ("Parkland Hospital") is a component, and **THE UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER AT DALLAS**, an educational agency of the State of Texas ("UT Southwestern").

PREAMBLE

For more than half a century, Parkland Hospital and UT Southwestern have been vital contributors to each other's emergence as highly respected clinical, teaching, and research institutions. Since UT Southwestern's establishment in 1943, it has been the source of Parkland Hospital's medical staff; and

Parkland Hospital has been UT Southwestern's primary teaching hospital. With both institutions working together, UT Southwestern has developed into one of the country's preeminent medical schools and Parkland Hospital has developed into one of the best public health and hospital systems in the nation.

The primary mission of Parkland Hospital is to deliver high quality health care services to the vulnerable populations and communities of Dallas County, with a secondary goal of providing a training ground for the community's health care professionals. The mission of UT Southwestern is to operate a medical institution for education, patient care, and research, with a national reputation for excellence in all three areas. Although somewhat different, these two institutional missions complement one another.

Over the decades, there have been significant expansions in the scope of activities

of both Parkland Hospital and UT Southwestern, which need to be addressed periodically in a forthright manner to assure that these two institutions are able to continue to thrive. DCHD now operates a network of community centered clinics throughout the Dallas County area, which together with Parkland Hospital (defined for the purposes of this Agreement as all the facilities and programs that are governed, operated and/or maintained by DCHD within the Southwestern Medical District; an area bounded by I-35, Mockingbird Lane, Denton Drive and Wycliff/Market Center Boulevard), comprise the major portion of the Parkland Health & Hospital System, and DCHD may need to further decentralize its services in order to

most effectively meet its mandate to deliver health care to the most medically underserved. UT Southwestern is affiliated with a number of other hospitals as well as Parkland Hospital, and it now owns and operates its own hospitals and clinics. The opportunities and challenges posed by the expansions of both institutions' activities require constant attention to the impact of the initiatives of one institution on the other.

RECITALS

Whereas, the DCHD wishes to provide medically indigent and paying patients with a high standard of medical care in an economical and efficient manner, and to advance the goals of medical education and research in order to contribute to the improvement of medical care in Dallas County; and

Whereas, the DCHD and Parkland Hospital benefit from having UT Southwestern provide physician services for the care of Parkland Hospital patients and for certain medical administrative functions; and

Whereas, UT Southwestern benefits from access to a large, excellent public hospital and clinic setting for many of its clinical activities, its undergraduate and graduate medical education training, and its clinically-based research activities; and

Whereas, both DCHD and UT Southwestern (the "Parties") wish to have UT Southwestern physicians provide by contract the exclusive medical staff at Parkland Hospital with the exception of certain medical administrators for Parkland

Hospital, as specified elsewhere in this Agreement; and

Whereas, geographically and historically Parkland Hospital and UT Southwestern have developed facilities on a single campus with a mutually supportive working relationship, to the significant benefit of the County, the State, and the patients served; and

Whereas, the close proximity of the Parties and the close integration of their programs present opportunities for economies and efficiencies in facilities use and the provision of technical and administrative support; and

Whereas, the Parties acknowledge that DCHD has the major responsibility for charity care in Dallas County; that the State of Texas does not currently appropriate dollars to DCHD or UT Southwestern for charity care; and

Whereas, the Parties acknowledge that each must comply with all applicable statutory and other legal requirements, including in the case of UT Southwestern complying with the intent of the Texas Legislature expressed in The General Appropriations Act of the State of Texas, which states: "Contracts Required: It is the intent of the Legislature that all institutions of higher education providing indigent health care contract with relevant counties in their service area to recover the costs associated with treating those counties' indigent patients"; and

Whereas, the Parties agree that DCHD will continue to operate Parkland Hospital as a teaching hospital, and DCHD wishes to support graduate

medical education to the extent that it contributes to the Parkland Hospital's patient care programs and the future quality and quantity of physicians in Dallas County; and

Whereas, the Parties are committed to ensuring that the academic nature of UT Southwestern's medical practice enhances Parkland Hospital's mission to achieve high quality patient care, and that DCHD's legal obligation to serve Dallas County indigent patients is fulfilled in a manner that enhances UT Southwestern's mission to provide high quality educational, clinical, and research programs;

Now, THEREFORE, for and in consideration of the mutual benefits hereunder and other good and valuable consideration, the Parties enter into this Agreement, identify the following program objectives, financial objectives, and management and governance objectives in do doing, and agree as follows:

I.

PURPOSE

The purpose of this Agreement is to address the structural, clinical, academic, organizational and financial issues related to the assurance of a continued positive relationship between DCHD, Parkland Hospital, and UT Southwestern, and to provide a framework for UT Southwestern's provision of physician services at Parkland Hospital and Parkland Hospital's provision of facilities for UT Southwestern's educational and clinical programs. Furthermore, this Agreement represents a covenant of mutual responsibility for each other's success in

meeting both institutions' missions; outlines guidelines for the relationship between DCHD, Parkland Hospital and UT Southwestern; describes the Parties' mutual intention and commitment that UT Southwestern shall be the exclusive provider of physician services at Parkland Hospital in as far as possible; and addresses the fact that each institution may need to form relationships with others without damaging the primary affiliation between DCHD, Parkland Hospital, and UT Southwestern. This Agreement is intended to define the basis for a long-term relationship.

II.

DEFINITIONS

The words used in this Agreement should be interpreted according to commonly accepted definitions. When words are identified which require further definition, such definitions shall be included in the pertinent sections of this Agreement.

III.

TERM AND TERMINATION

This initial term of this Agreement is for a ten (10) year period beginning September 1, 2006 and ending August 31, 2016. Upon expiration of the initial term, the Agreement shall automatically be renewed for one additional five (5) year period unless written notice of non-renewal has been given two (2) years prior to the expiration of the initial term. Either Party may terminate the Agreement without cause at any time with two (2) years written notice to the other.

This Agreement may be terminated for cause only as expressly provided as follows: (1) Any Party may terminate this Agreement upon a material breach by the other Party by giving written notice of such breach and allowing the other Party a reasonable time to cure the breach. If the breach is subject to cure but the other Party has not cured such breach within a reasonable time, this Agreement terminates upon the delivery by the terminating Party to the defaulting Party of notice of such failure to cure and of termination. (2) In the event of a change in law or regulation, or interpretation thereof, which would, in the opinion of a Party relying on the advice of legal counsel, render the Agreement or any part thereof illegal or otherwise jeopardize any party's tax exempt status or status as a Medicare/Medicaid provider or other fundamental status, the Parties shall negotiate in good faith to amend the Agreement to remove the objectionable part. Should the Parties be unable to so amend the Agreement within a reasonable time period, a Party may terminate the Agreement by giving written notice of termination to be effective within a reasonable time period from the date of notice, and the Agreement shall terminate at the end of the stated period. (3) The Agreement will terminate automatically in the event Parkland Hospital loses its hospital license or JCAHO accreditation, or UT Southwestern fails to maintain its status as an accredited medical school. (4) As provided and for the reasons set out in Section V.C of this Agreement

IV.

PROGRAM OBJECTIVES

A. **Beneficial Relationship.** The Parties, through a mutually beneficial relationship, will provide a high quality of patient care in all Parkland Hospital programs, using the best modern technology and the most current medical protocols.

B. **Location of Services; Exclusivity of Physician Services.** The Parties agree that all medical services currently provided within the Southwestern Medical District to DCHD patients by UT Southwestern will not be moved to sites outside Southwester Medical District unless the parties agree in writing UT Southwestern will have the exclusive right to provide all physician services at Parkland Hospital, except where provision is made for non-UT Southwestern physician to provide care under specific written agreements between the Parties or when UT Southwestern is unable or fails to provide the totality of such service at costs comparable to community, regional and national standards. In addition, UT Southwestern shall be considered for providing contracted or outsourced medical services required in other DCHD facilities or programs not located in the Southwestern Medical District, as defined in the preamble to this Agreement, early in the planning and solicitation of such services.

C. **Physicians Assigned to Parkland Hospital:** UT Southwestern will provide a core of physicians dedicated primarily to the Parkland Hospital service and will provide good access to

Parkland Hospital patients, within the limits of DCHD's ability to pay for physician services and to provide appropriate facilities, equipment, supplies and staffing. The Parties agree that in a number of specialties, the UT Southwestern physicians attending at Parkland Hospital may have responsibilities in other facilities as well, for reasons related to scale, coverage, and the applicability of expertise from case to case. It is the intent of this Agreement to promote fair and reasonable access for Parkland Hospital patients to a full range of care on a timely basis. To that end, the Master Services Agreement ("MSA") will include a description of physicians assigned to Parkland Hospital by service, where appropriate. The Parties will together assure that the clinical services provided by the two institutions are of high quality. The Parties acknowledge that the growth and development of tertiary services both at UT Southwestern's hospitals and clinics and at Parkland Hospital benefits both Parties by aiding the recruitment to the campus of a number of specialists who, in some instances, may not be supported by the scale and variety of the case mix at either Parkland Hospital or UT Southwestern hospitals alone.

D. **Joint Planning Activities**: The Parties agree that it is a program objective of this Agreement to achieve continuous and transparent joint planning activities to promote mutually supportive and beneficial program development, physician recruitment and retention, facilities development, and clinical systems planning, including both information systems and human resources.

E. **Hospital and Clinical Operations Support; Facilities**: DCHD commits in this Agreement to provide hospital and clinical operations support and facilities that will promote the efficient use of physicians' time.

F. **Undergraduate Medical Education**: DCHD will provide access to patients for undergraduate medical education clinical experiences supervised by UT Southwestern faculty, but assumes no financial responsibility for the conduct of these programs or their costs.

G. **Graduate Medical Education**: The Parties acknowledge that Parkland Hospital is the primary teaching site for UT Southwestern, and the Parties will jointly conduct a range of nationally-competitive graduate; medical education programs. DCHD acknowledges that the approved costs of administration, supervision, and stipends of residents and fellows working at Parkland Hospital are a responsibility of DCHD and are significantly offset by the residents' role as attending physician extenders in providing patient care. UT Southwestern acknowledges that the State of Texas as of the date of this Agreement provides some earmarked support for graduate medical education ("GME") for the purpose of funding faculty time expended in resident education, agrees to allocate the support received for faculty time at Parkland Hospital toward the jointly conducted GME programs, and agrees to continue to seek increases in the levels of that support. UT Southwestern also acknowledges the value of the relationship with Parkland Hospital to UT Southwestern's faculty in

both teaching and research endeavors, and agrees to provide faculty to provide faculty to supervise residents and fellows at Parkland Hospital, except as specifically agreed in writing. The Parties acknowledge the importance of full consultation with each other regarding numbers of residents, standards of supervision, accreditation requirements and all other aspects of the residency training programs. The Parties also agree on the importance of maintaining a nationally-competitive, high quality teaching program at Parkland Hospital.

H. **Documentation and Information Systems**: The Parties agree to strive to achieve high standards of accuracy and clarity in medical documentation and medical information systems. Record-keeping and the use of clinical data will be in full compliance with standards promulgated by appropriate local, state, and national public and private agencies.

I. **Clinical Research Programs**: The Parties may conduct clinical research programs in Parkland Hospital facilities. To the extent possible, UT Southwestern will assure that Parkland Hospital receives appropriate credit and acknowledgment of research and publications related to clinical research conducted by UT Southwestern faculty at Parkland Hospital.

V.

FINANCIAL OBJECTIVES

A. **Cost Effective Programs**: The Parties are committed to the development of programs under this Agreement in such a manner as to minimize net

costs to DCHD and UT Southwestern, while ensuring the provision of high quality clinical, educational and research programs to which both Parties are committed. UT Southwestern physicians will participate in incentive programs at Parkland Hospital that are designed to improve both quality and financial performance and that comply with federal and state law.

B. **Physician Billing and Collections**: UT Southwestern accepts the responsibility for billing and collecting for physician services provided to patients other than Parkland Covered Patients, as defined in the MSA, and for costs for third-party billing of such patients, except where otherwise stipulated in the MSA. UT Southwestern will actively seek third party payment for clinical services whenever possible. Parkland Hospital agrees that it must provide certain registration information to facilitate billing for third party payments, and that the information will be provided and transmitted electronically to UT Southwestern in a commercially reasonable manner compatible with information in UT Southwestern patient information systems, which is necessary for UT Southwestern to be able to bill and collect for services from third-party payers and thereby minimize any financial losses in conjunction with its clinical services at Parkland Hospital.

C. **Compensation for Physician Services**: Parkland Hospital agrees to pay reasonable fees to UT Southwestern for the clinical care services its staff provides to uninsured patients and other Parkland Hospital patients for which DCHD has agreed to assume financial responsibility for

physician services for Parkland Covered Patients as defined in the MSA, and for administrative and supervisory services provided by UT Southwestern physicians at Parkland Hospital. The methodology for calculating payments for UT Southwestern physician services will be defined in the MSA and will employ empirical data that is auditable and verifiable, to measure the extent and complexity of the services rendered. Unless otherwise agreed by the Parties, payment methodologies will aim to achieve comparability with costs for these services in local, regional, and national markets. The Parties expect that these methodologies will result in payments that will discharge their responsibilities as expressed in the "Contracts Required" provision of The General Appropriations Act of the State of Texas in effect upon execution of the Agreement, and that will be in accordance with DCHD purchasing policies. In the event the Texas Legislature changes the "Contracts Required" provision of The General Appropriations Act, and/or the Board of Regents of The University of Texas System, UT Southwestern, the Dallas County Commissioners Court, or DCHD adopt new policies or modify existing policies that materially affect the scope of services under tins Agreement or payments from DCHD and/or Parkland Hospital to UT Southwestern for clinical care services UT Southwestern's staff provide to Parkland Covered Patients, then DCHD and/or UT Southwestern, as the case may be, shall provide the other Party with immediate written notice of the new or modified policy. The Party impacted by the new or modified policy will have sixty (60) days (the "Review Period") from the date of receipt of this notice to

review the new or modified policy, and to determine as to its impact on the Agreement. If the Party reasonably determines the impact of the new or modified policy to be adverse to its interests and obligations under the Agreement, the Party will have the right either to seek appropriate amendment(s) to the Agreement, or in its sole discretion, to provide the other Party, prior to the expiration of the Review Period, written notice of the (a) Party's intent to terminate the Agreement, and the (b) effective date of the termination. Prior to the effective termination date, DCHD shall continue to pay fees to UT Southwestern consistent with the fees established in the MSA, and UT Southwestern shall continue to provide clinical care services in accordance with the MSA.

D. **Assignment of Payments Associated with Parkland Covered Patients**: For any patients classified as Parkland Covered Patients for whom UT Southwestern has received payments from DCHD for services rendered, and for which UT Southwestern also receives payments from such patients or from third parties on their behalf, UT Southwestern will assign and convey any and all such payments to Parkland Hospital, unless otherwise stipulated in the MSA.

E. **Joint Program Investments**: Any agreements on joint investments made by or on behalf of the Parties in pursuit of the goals of this Agreement will be made on the basis of the relative costs and benefits to each of the Parties.

F. **Residency and Fellowship Program Costs**: Residency and fellowship program costs for

approved residents and fellows working at Parkland Hospital are the responsibility of DCHD. UT Southwestern will participate in funding residency and fellowship program costs to the extent that it receives appropriations from the State to support faculty supervision and teaching of residents and fellows being trained at Parkland Hospital. The methodology for covering these costs will be reduced to writing in the MSA or a separate Agreement on Graduate Medical Education Programs.

G. **Clinical Research Programs**: Clinical research programs conducted by UT Southwestern faculty at Parkland Hospital will be directly related to and part of Parkland Hospital's patient care programs. In the event that intellectual property is developed as the result of such programs, the property will be properly described and claimed in patent or copyright documents and the appropriate filings made. Pursuant to The University of Texas System Board of Regents' Rules and Regulations, intellectual property created by University of Texas System employees generally within the scope of their employment is subject to a claim of ownership by The Board of Regents, with exceptions of scholarly articles, books and educational materials, in accordance with academic norms. The University of Texas System has protocols for sharing the benefits of property in which the Board of Regents has claimed an ownership interest, with individuals and institutions that make significant contributions of facilities and/or know-how to the creation of the property; such protocols shall be used as a basis for payments or assignments to DCHD for any such contribution in appropriate circumstances.

H. **Commercialization of Intellectual Property**: Any economic value that may be realized from commercialization of, or intellectual property rights related to, clinical services, processes, procedures, methodologies or workflows used or developed to provide medical care and other professional services at Parkland Hospital and other DCHD facilities in the Southwestern Medical District (excluding clinical programs referred to in paragraph V.G above) through the combined efforts of UT Southwestern and DCHD personnel will be owned jointly and revenues there from shared proportionally with respect to their contributions by DCHD and UT Southwestern, except as otherwise agreed to by written agreement by the Parties.

VI.

MANAGEMENT AND GOVERNANCE

A. **Administration of Programs**: Executive Leadership Council: The Chief Executive Officer ("CEO") of Parkland Hospital and the President of UT Southwestern have the authority to administer programs envisioned in this Agreement and by mutual agreement may create joint management teams, adopt policies, negotiate contracts, and resolve disputes related to the contract(s), within the limitations on their executive authority contained in their respective institutional policies and procedures and state law. To promote continuing consultation and review of issues that may arise in the relationship, the CEO and UT Southwestern President will co-chair an Executive Leadership Council ("Council") composed of up to twelve members (five from each institution appointed by the

co-chairs.) This Council will meet monthly and additionally as needed.

B. **Affiliation Oversight Committee**: The Parties shall establish an Affiliation Oversight Committee ("Committee") to monitor and resolve conflicts related to this Agreement. The Committee will consist of five (5) members from UT Southwestern: its President, its Chief Business Officer, and its three (3) highest ranking clinical and academic executives; and five (5) members from DCHD: the Chair of the Board of Managers of DCHD, its President/CEO, its Chief Medical Officer ("CMO"), its Chief Operating Officer ("COO"), and one additional member of the Board of Managers appointed by the Board Chair. The Committee shall serve as an adjudicating body regarding compliance with terms of this Agreement, but it does not have final authority. Either the CEO of DCHD or the President of UT Southwestern may convene the Committee and establish the agenda. After appropriate deliberation by the Council, unresolved disputes will be referred to the Committee. After reviewing such issues, the Committee shall make recommendations to the DCHD Board of Managers and the President of UT Southwestern. Any disagreement that remains unresolved after exhaustion of the Committee's resolution process may be submitted to mediation upon the agreement of both Parties.

C. **Master Services. Agreement**: The Parties will enter a MSA which will be renegotiated annually and which will contain, but not be limited to, the following: performance requirements for UT

Southwestern physician services, including verification requirements; requirements for Parkland Hospital to provide adequate payment in accordance with Section V.C. of this Agreement, necessary and adequate space, equipment, staff, and infrastructure support in order for the UT Southwestern physicians to accomplish their duties in an acceptable manner; performance requirements for clinical operations and billing demographics support, including verification requirements; payments calculation methodologies for all programs; provider qualifications; roles of UT Southwestern service chiefs and department chairs relative to the roles of the Parkland CMO and other Parkland Hospital employed physician-administrators; roles of UT Southwestern physicians on hospital committees; DCHD and UT Southwestern responsibilities in the conduct of GME; compliance; incentive programs; requirements and terms for joint research activities; dispute resolution; and MSA termination. Nothing in the MSA may contradict the terms of this Agreement without there having been adopted a formal amendment to the Agreement allowing such provisions.

D. **Joint Planning; Planning Executives:** It is the express intent of this Agreement that the Parties achieve more effective joint long and short term planning. The CEO of Parkland Hospital and the President of UT Southwestern will identify one executive officer in his/her institution (the "Planning Executives") whose responsibility will be to insure effective communication about prospective and actual program initiatives and facilities plans that would impact the other Party, while there is still opportunity to explore joint commitments or to raise

other issues. Timely and clear communication about plans and proposals will be required, including deadlines for response and commitment to program proposals. The Planning Executives appointed by the CEO and President will appoint such planning committees as are needed, and will make progress reports on their work to the Council.

E. **Discontinuation of Programs**: Neither Party may discontinue programs covered in this Agreement or in the MSA without reasonable and timely notification of the other Party, including time for review of the reasons for discontinuation; acquisition of alternative services or services venues; and management of employee transitions.

F. **Parkland Chief Medical Officer**: The Parkland Hospital CMO will be hired by the Parkland Hospital CEO and will be identified in a search process that includes consultation with and participation by UT Southwestern clinical leaders. The President of UT Southwestern will be actively involved in the selection, regular evaluation, and decision to continue or terminate the employment of the CMO. The UT Southwestern President may express "no confidence" in the CMO, which would necessitate a discussion by the CEO and Board of Managers of the DCHD about the performance and effectiveness of the CMO. To the extent that the CMO is hired and retained with the advice and counsel of the President of UT Southwestern, the CMO shall have a position at UT Southwestern as a senior member of UT Southwestern for Parkland Hospital related issues and such position shall not be unreasonably withheld.

G. **Physician Relations; Annual Staffing Plans**: The Parkland Hospital CMO shall be the Parkland Hospital executive with responsibility for the management of physician relations at Parkland Hospital and shall be consulted when UT Southwestern medical service chiefs are identified for Parkland Hospital services. Annual staffing plans for physician assignment to patient care and training responsibilities at Parkland Hospital shall be prepared with advice and consent from the CMO and such consent shall not be unreasonably denied. The physician leadership model in place for the affiliation will be reviewed annually by the Council.

H. **Parkland Medical Directors**: Medical Directors who report to the CMO may be hired by Parkland Hospital, with the advice and counsel of UT Southwestern. These leaders are expected to devote at least 90% of their effort at Parkland Hospital; be physically located at Parkland Hospital; be employed and/or terminated by Parkland Hospital; collaborate with Parkland Hospital leadership in operational and capital budget development in areas of their responsibility; and have distinct roles in the oversight of UT Southwestern-provided services at Parkland Hospital. UT Southwestern will recognize the administrative authority of these Medical Directors in Parkland Hospital. Physicians employed to fulfill these physician administrative roles at Parkland Hospital must be qualified for faculty appointments at UT Southwestern. To the extent the Medical Directors are hired and retained with the advice and consent of UT Southwestern, they will be appointed to appropriate faculty positions and such appointments shall not be unreasonably withheld.

Any UT Southwestern physicians identified to fill other administrative functions at Parkland Hospital will be approved by the Parkland CEO and such approvals shall not be unreasonably withheld.

I. **UT Southwestern Search Committees:** The Parkland CEO, or an acceptable designee nominated by the Parkland Hospital CEO, shall be represented on search committees for the UT Southwestern Department Clinical Chairs and the medical school Dean.

J. **Parkland Committees:** UT Southwestern physicians will participate in and support the activities of committees at Parkland Hospital related to program planning, accreditation, quality of care, compliance, residency programs, and other areas as normally found in a teaching hospital.

K. **Patient Transfers:** UT Southwestern provides physician staffing at hospitals and clinics that it owns and operates. To avoid potential conflicts of interest related to Parkland Hospital's need to attract and retain funded patients to partially offset the cost of caring for indigent Parkland Covered Patients at Parkland Hospital, it is agreed that transfer of patients from Parkland Hospital to a UT Southwestern hospital, or vice versa, will require prior approval by a senior administrator of the transferring hospital as well as acceptance as a patient by the receiving hospital.

L. **Annual Meeting:** An annual meeting will be held at which members of the DCHD Board, Parkland Hospital administration, and UT Southwestern administration will discuss the status

of the affiliation and prepare. for renegotiation of the MSA All terms of the MSA currently in place at the time this Agreement is adopted may be renegotiated to conform to the objectives and terms of this Agreement.

VII.

PRIOR AGREEMENTS SUPERSEDED

This Agreement supersedes any and all other Affiliation Agreements, either oral or in writing, between the Parties thereto with respect to the subject matter hereof, and no other Agreement, statement, or promise relating to the subject matter of this Agreement which is not contained herein shall be valid or binding.

VIII.

GOVERNING LAW

The validity of this Agreement and of any of its terms or provisions, as well as the rights and duties of the Parties hereunder, shall be governed by the laws of the State of Texas.

IX.

NOTICE

Any notices to be given hereunder by either Party to the other shall be effected in writing either by personal delivery or delivery by certified mail, postage prepaid, with return receipt requested. Mailed notices shall be addressed to the Parties at the addresses appearing in the following paragraph of this Agreement, until and unless such Party

changes the specified address by written notice to the other.

Notice shall be given to each of the Parties at the following addresses:

If to the DCHD:	Parkland Health & Hospital System 5201 Harry Hines Blvd. Dallas, TX 75235 Attn: Chief Executive Officer
With Copy to:	Chair, Board of Managers Dallas County Hospital District 5201 Harry Hines Blvd. Dallas, TX 75235
If to UT Southwestern:	President 5323 Harry Hines Blvd. Dallas, Texas 75390-9002
With Copy to:	Executive Vice President for Business Affairs 5323 Harry Hines Blvd. Dallas, Texas 75390-9013

X.

AMENDMENT

No amendment or modification to this Agreement shall be valid or binding unless it is in writing, dated subsequent to the date of this Agreement and executed by the Parties hereto.

XI.

ASSIGNMENT

This Agreement is not assignable by either Party without the prior written consent of the other. Any assignment without such consent shall be void and have no effect.

XII.

LEGAL CONSTRUCTION

In case any one or more of the provisions contained in this Agreement shall, for any reason, be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision thereof and this Agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained herein.

Executed in Duplicate Originals on the date first written above.

THE UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER AT DALLAS

/s/
Kern Wildenthal, M.D., Ph.D.
President

DALLAS COUNTY HOSPITAL DISTRICT

/s/
Ron J. Anderson, M.D.
Chief Executive Officer

/s/
Chair, Board of Managers
Dallas County Hospital District

DEFENSE TRIAL EXHIBIT 19

E-MAIL FROM NAIEL NASSAR TO
VERNON MULLEN, *ET AL.*

RE: MY RESIGNATION LETTER

JULY 7, 2006

From: Naiel Nassar
To: Vernon Mullen; Alfred Gilman; Greg Fitz; Beth Levine; kern.wildentah@utsouthwestern.edu
Date: Friday, July 7, 2006 4:58 PM
Subject: My resignation letter

Enclosed please find a copy of my resignation letter

Naiel N. Nassar, MD, FACP
Associate Medical Director
HIV Department
Parkland Health and Hospital System
Dallas, Texas

[The attached Resignation Letter is reproduced in this Appendix at Plaintiff's Trial Exhibit 15]

DEFENSE TRIAL EXHIBIT 20

E-MAIL FROM NAIEL NASSAR TO SYLVIA MORENO

JULY 10, 2006

>>> Naiel Nassar 07/10/06 5:54 PM >>>

I don't have anything new. I got no offer letters and heared [sic] nothing from Sam Ross. I guess I am going West. Please read attached

Naiel N. Nassar, MD, FACP
Associate Medical Director
HIV Department
Parkland Health and Hospital System
Dallas, Texas

>>> SYLVIA MORENO 07/10/06 4:54 PM >>>

Naiel,

Could you update me on this issue?

Thank you,

Sylvia

* * *

[Attachment page two of resignation letter , which is reproduced in its entirety in this Appendix at Plaintiff's Trial Exhibit 15]

sagging morale, and for many clinical faculty members to resign. Dr Levine always showed lack of interest in the clinical affairs of the division and often failed in recognizing shortages in needed clinical coverage, which negatively affected patient care. On multiple occasions Dr Levine made

statements that showed lack of respect of clinical faculty, trivialized our role within UTSW, and described clinical faculty as a "waste of the division's budget".

Finally, I would like to thank you, Dr. Fitz, for all your support. All my interactions with you have been pleasant and positive. I believe you to be a very honorable person and you always kept your promises to me. It saddens me to have to leave the many good friends among our clinical faculty, Parkland-HIV administration and Research staff.

Sincerely;

/s/

Naiel N. Nassar, MD, FACP

cc:
Kern Wildenthal, MD
Alfred Gilman, MD
Vernon Mullen
Beth Levine, MD
CAIR-DFW Chapter.

DEFENSE TRIAL EXHIBIT 21

E-MAIL FROM SAMUEL ROSS TO NAIEL NASSAR

JULY 11, 2006

From: "SAMUEL ROSS"
<SROSS@parknet.pmh.org>
To: "Naiel Nassar"
<Naiel.Nassar@UTSouthwestern.edu>
Date: Tuesday, July 11, 2006 10:41 AM
Subject: Fwd: Re: Employment Issues

Naiel,

Please don't commit to anything just yet. The reason you have not heard from me is that many conversations are going on to try to resolve this issue. We value your services and are trying to find acceptable solution for all parties. Thanks

Samuel Ross, M.D., M.S.
Executive VP\ Chief Medical Officer
Parkland Health & Hospital System

>>> RANDY BLANCHARD 7/11/2006 10:02 AM >>>

FYI-Heads Up.

>>> SYLVIA MORENO 7/10/2006 7:09 PM >>>

It looks like we have lost Naiel. Indecision and poor decisions have cost us all the only 100% primary care physician at Amelia Court. Besides Dr. Keiser, he was the only UT Faculty that supported Parkland admin and policy. I am going to start working on another candidate.

* * *

>>> Naiel Nassar 07/10/06 5:54 PM >>>

I don't have anything new. I got no offer letters and heared [sic] nothing from Sam Ross. I guess I am going West. Please read attached

Naiel N. Nassar, MD, FACP
Associate Medical Director
HIV Department
Parkland Health and Hospital System
Dallas, Texas

>>> SYLVIA MORENO 07/10/06 4:54 PM >>>

Naiel,

Could you update me on this issue?

Thank you,

Sylvia

* * *

DEFENSE TRIAL EXHIBIT 25

E-MAIL FROM SYLVIA MORENO TO NAIEL NASSAR, RE: EMPLOYMENT ISSUES

JULY 20, 2006

From: "SYLVIA MORENO" <SAMORE@parknet.pmh.org>
To: "Naiel Nassar" <Naiel.Nassar@UTSouthwestern.edu>
Date: Thu, 20 Jul 2006 21:06:05 -0500
Subject: Re: Employment Issues

Naiel,

I appreciate all of your efforts to remain in Dallas. There is no one to replace your standard of practice and professionalism. After 30 years at Parkland, I can honestly say that this is one of the most bitter experiences I have had in management.

Sylvia

* * *

>>> Naiel Nassar 07/20/06 5:12 PM >>>

I haven't heared [sic] anything from anyone re employment with: Parkland. I went ahead and accepted the job in CA and I listed my house here for sale as of today. I will remain in clinic till the last week of August. I am very sorry to have to leave a job that I truly loved and to leave many good friends behind. My departure has nothing to do with Amelia court or its administration. Part of my departure is family-related, another is having to do with UTSW as outlined in my resignation letter.

NN

Naiel N. Nassar, MD, FACP
Associate Medical Director
HIV Department
Parkland Health and Hospital System
Dallas, Texas

>>> SYLVIA MORENO 07/10/06 4:54 PM >>>

Naiel,

Could you update me on this issue?

Thank: you,

Sylvia

* * *

DEFENSE TRIAL EXHIBIT 26

EEOC CHARGE OF DISCRIMINATION

AUG. 8, 2006

EEOC Form 5 (5/01)

CHARGE OF DISCRIMINATION		
This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other Information before completing this form.	Charge Presented To: [ ]FEPA [X]EEOC	Agency(ies) Charge No(s): **450-2006-02750**

Texas Workforce Commission Civil Rights Division and EEOC

State or local Agency. If any

Name *(indicate Mr. Ms. Mrs.)*	Home Phone *(Incl. Area Code)*	Date of Birth
Dr. Naiel Nassar	**(XXX) XXX-XXXX**	**09-01-1960**

Street Address	City State and ZIP Code
5565 Preston Oaks Road #166, Dallas, TX 75264	

Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others *(If more than two, list under PARTICULARS below.)*		
Name	No. Employees, Members	Phone No. *(Incl. Area Code)*
UTSW MEDICAL CENTER	**201 – 500**	**(XXX) XXX-XXXX**
Street Address City State and ZIP Code		
5323 Harry Hines Blvd., Dallas TX 75390		
* * *		

DISCRIMINATION BASED ON *(Check appropriate box(es).)*	DATE(S) DISCRIMINATION TOOK PLACE	
	Earliest	Latest
[ ]RACE [ ]COLOR [ ]SEX [X]RELIGION [X]NATIONAL ORIGIN [X]RETALIATION [ ]AGE [ ]DISABILITY [ ]OTHER *(Specify below.)*	**10-03-2005**	**08-07-2006** [ ]CONTINUING ACTION

THE PARTICULARS ARE
(If additional paper is needed, attach extra sheet(s):

I. Personal Harm:

a. From approximately October 3, 2005 until I was forced to resigned on July 3, 2006, I was subjected to constant harassment and a hostile work environment by Dr. Beth Levine, Division Chief of Infectious Disease, in that I was threatened with denial of promotion, loss

of salary support, potential loss of job, subjected to different terms of conditions of employment than other similarly situated employees who were not of a different national origin or religion and I was subjected to negative comments regarding my national origin and religion . On or about April 27, 2006, I complained to Dr. Gregory Fitz, Chairman of Medicine that I was being subjected to discriminatory acts, however no action taken in response to my complaint. On or about July 3, 2006, I was forced to resign from my Assistant Professor of Medicine position due to the constant harassment.

b. On or about July 7, 2006, I was given a negative job reference in retaliation for me engaging in a activity protected under Title VII.

II. Respondent's Reason for Adverse Action:

a & b. No reason was given.

III. Discrimination Statement:

I believe that I have been discriminated against because of my National Origin, Middle Eastern (Egyptian) and my religion, Muslim in violation of Title VII of the Civil Rights Act of 1964, as amended. I further believe that l have been retaliated against for opposing and engaging in protected activity in violation of Section 704(a) Title VII of the Civil Rights Act of 1964.

* * *

I declare under penalty of perjury that the above is true and correct		I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief. SIGNATURE OF COMPLAINANT
Aug 08, 2006	/s/	/s/
Date	*Charging Party Signature*	

DEFENSE TRIAL EXHIBIT 28

LETTER FROM CARLITA C. ROMERO TO NAIEL NASSAR

RE: EMPLOYMENT STATUS

JUNE 2, 2008

CCFMG
Clinical California Faculty Medical Group

June 2, 2008

Naiel Nassar, M.D.
12222 Avenue 472
Orange Cove, CA 93720

Re: Employment Status

To Whom It May Concern:

This Letter is to Confirm Naiel Nassar, M.D. has been employed as a physician with Central California Faculty Group since September 1, 2006. He is a regular full-time employee.

Sincerely,

CCFMG

/s/

Carlita C. Romero
Human Resources Generalist

4910 E. Clinton Avenue
Suite 101
Fresno, CA 93727-1505
559.453.5200
559.453.5233 fax
www.ccfmg.org

DEFENSE TRIAL EXHIBIT 56

(identical to Defense Trial Exhibit 13)

E-MAIL FROM SAMUEL ROSS TO SYLVIA MORENO

RE: MEETING REQUEST

APR. 17, 2006

Date: Mon, 17 Apr 2006 15:56:23 - 0500
From: "Samuel Ross" <SROSS@parknet.pmh.org>
To: "Sylvia Moreno" <SAMORE@parknet.pmh.org>, "Naiel Nassar" <Naiel.Nassar@UTSouthwestern.edu>
Subject: Fwd: Re: Meeting Request

Yes, I talked to him about you becoming a Parkland employee and he does not support the idea.

Samuel Ross, M.D., M.S.
Executive VP\Chief Medical Officer
Parkland Health & Hospital System

>>> Naiel Nassar 4/17/2006 9:40 AM >>>

any ideas what this is about?

Naiel N. Nassar, MD, FACP

[Handwritten note]

This is Dr. Ross response to my email telling him I have up-coming mtg w Dr. Fitz & asking him about any info

NN

DEFENSE TRIAL EXHIBIT 78

UT SOUTHWESTERN MEDICAL CENTER
FACULTY REVIEW FOR NAIEL NASSAR, M.D.

MAR. 6, 2006

UT SOUTHWESTERN MEDICAL CENTER	
UT Southwestern values excellence in education, research, patient care, and the support services that make these possible. We believe that an ongoing performance management process supports these values by providing a method for faculty to understand what is expected, know how they are doing, and see how to sustain excellence.	
FACULTY REVIEW	
Name: **Naiel Nassar, M.D.**	Dept: **Internal Medicine / Infectious Diseases**
Faculty Rank: **Assistant Professor**	Track: **Non-Tenured Clinician**
Use the following ratings: U = Unsatisfactory S = Satisfactory G = Good VG = Very Good E = Excellent NA = Not Applicable	

Rate each individual relative to other members of the Department. The departmental faculty ratings in each category must be reasonably distributed among satisfactory, good and excellent. Examples of items to be considered are listed after each element.	
SECTION A. TEACHING	
1. **Lectures** Does faculty member deliver lucid presentation of relevant, current material? Is there evidence of diligent preparation? Are students/ trainees enlightened rather than confused?	U S G VG [E] NA
2. **Small Group Instruction** - Does faculty member relate professionally and effectively to individual students/trainees in laboratory, conference, and patient-related sessions? Is depth of knowledge sufficient to inspire confidence in student/trainees?	U S G VG [E] NA
3. **Student Research Supervision**- Does faculty member train individual graduate students, medical students, and postdoctoral fellows to perform quality research? Do these students/trainees become productive investigators?	U S G VG E [NA]
4. Clinical Training - Does faculty member serve as an effective role model who exemplifies the ideals of medical practice? Are students and house staff taught sound clinical skills?	U S G VG [E] NA

SECTION B. RESEARCH	
5. **Grants**- Does faculty member have independent grant support awarded through peer review? Is faculty a crucial participant in a research team with strong grant support?	U S G VG E [NA]
6. **Publications** Does faculty member regularly publish full-length research papers in leading, critically-reviewed professional journals? In the case of publications with multiple authors, is faculty member's contribution worthy of significant credit?	U S G VG E [NA]
7. **Quality and Progress** - Is research effort directed toward well-defined, important questions? Is progress adequate relative to the difficulty of the problem?	U S G VG E [NA]
SECTION C. CLINICAL SERVICE	
8. **Quality** - Is faculty member a highly skilled clinician?	U S G VG [E] NA
9. **Quantity** - Does faculty member devote significant effort to clinical duties?	U S G [VG] E NA
10. **Academic Emphasis** - Does faculty member communicate clinical experience through teaching and publication?	U S G [VG] E NA

11. **Patient Service** - Does faculty member consistently satisfy the emotional and service needs of patients? Does he/she demonstrate the PACT values of Problem Solving, Ability, Appearance and Attitude, Communications and Compassion and Teamwork?	U S G VG [E] NA
SECTION E. COMMITTEE SERVICE	
12. **Institutional** Does faculty member accept departmental and/or university-wide committee assignments? Is faculty member a dependable and respected member of institutional committees?	U S G VG [E] NA
13. **External** Does faculty member bring credit to the institution through service in professional societies, editorial boards, study sections, advisory panels, etc?	U S G VG E [NA]
SECTION F. OTHER	
14. **Internal Control** Does faculty member perform internal control responsibilities to assure effective and efficient operations, reliability of financial reporting and compliance with applicable laws and regulations?	U S G VG [E] NA
If faculty member has significant supervisory responsibilities, complete Section G supervisory review before proceeding to number 15.	
* * *	

SECTION H. CONCLUSIONS THIS SECTION MUST BE COMPLETED FOR ALL FACULTY MEMBER	
15. **Promotion** - Is the faculty member making appropriate progress toward promotion?	U S G VG [E] NA
16. **Track** Is the track to which the faculty member is assigned the appropriate one? If no, please explain the proposed change. Change of track requires a letter to the Dean and faculty's signature agreement.	[Yes] No
17. **Overall Rating** This is not an average of the first 14 ratings (and the Supervisory Review, if applicable). Certain criteria may carry different weights	U S G VG [E] NA
18. **Comments** - Use this section to elaborate on above ratings or to discuss other areas of importance related to faculty members' performance. List major accomplishments or contributions as well as major weaknesses or problem areas since last review. **Dr. Nassar continues to be an excellent clinician and teacher with an outstanding fund of knowledge in general infectious diseases, HIV medicine, and antibiotic usages and outstanding clinical judgment. His excellence as an Infectious Diseases physician has resulted in the**	

recommendation of the P & T committee to promote Dr. Nassar to Associate Professor effective 9/1/07. During the past year, he became Chair of the Pharmacy & Therapeutic antibiotics subcommittee and has continued to increase his participation in Divisional teaching / educational activities. In the next year, I hope to see this continue further I also hope that his record wRVU's will be commensurate [unreadable text].

Date of Appraisal: **3/6/06**	Date of Discussion: **3/6/06**
Appraiser's Signature **/s/ Beth Levine**	Faculty's Signature **/s/ Naiel Nassar**

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
MAR 4 - 2013
OFFICE OF THE CLERK

No. 12-484

In the
Supreme Court of the United States

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER,

PETITIONER,

v.

NAIEL NASSAR, M.D.,

RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether Title VII's retaliation provision and similarly worded statutes require a plaintiff to prove but-for causation (*i.e.*, that an employer would not have taken an adverse employment action but for an improper motive), or instead require only proof that the employer had a mixed motive (*i.e.*, that an improper motive was one of multiple reasons for the employment action).

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is published at 674 F.3d 448 and reproduced at Pet. App. 1.

JURISDICTION

The court of appeals entered its judgment on March 8, 2012. Pet. App. 1. Rehearing *en banc* was denied on July 19, 2012. *Id.* at 59–60. The petition for writ of *certiorari* was granted on January 18, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Relevant provisions of Title VII of the Civil Rights Act of 1964 ("1964 CRA"), Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000e *et seq.*), as amended by the Civil Rights Act of 1991 ("1991 CRA"), Pub. L. No. 102-166, § 107(a), 105 Stat. 1071, 1075 (codified at 42 U.S.C. §§ 2000e-2(a), 2000e-2(m), 2000e-3(a), 2000e-5(g)), are reproduced in the appendix to this brief at App. 2–6. Relevant provisions of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 623(a), and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12112(a) (2007), as amended by the ADA of 2008, Pub. L. 110-325 § 5, 122 Stat. 3553, are reproduced in the appendix to this brief at App. 1, 7–8.

INTRODUCTION

If the question presented sounds familiar, the reason is that this Court already decided it. In *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 177 (2009), this Court held that the Age Discrimination

in Employment Act requires a plaintiff to prove that age was the but-for cause of an employment action. This case concerns a materially identical statute, Title VII's retaliation provision. The parallelism between the two statutes is no accident: Congress deliberately copied the relevant Title VII language when it enacted the ADEA. Moreover, Congress later amended Title VII to authorize mixed-motive claims for some types of discrimination *but not retaliation*. Thus, Title VII's retaliation provision continues to require a plaintiff to prove but-for causation for precisely the same reasons the ADEA does.

Any other conclusion would run afoul of the most fundamental canons of construction by treating identical provisions differently absent some statutory language requiring differential treatment. Such an unprincipled approach to statutory construction would unleash chaos in the interpretation of the federal employment statutes (and perhaps all federal statutes). Congress, courts, and litigants could no longer presume that the same words, phrases, or provisions have the same meanings across related statutes.

In addition, relieving a plaintiff of the need to prove but-for causation would reopen a can of worms concerning the implementation of a mixed-motive regime that this Court sought to close in *Gross*. It would also invite abuse and unfairness, as this case demonstrates. Petitioner University of Texas Southwestern Medical Center (the "Medical School") made and announced the challenged decision well *before* respondent Naiel Nassar engaged in any protected activity, and thus well *before* any impetus

for actionable retaliation arose. Therefore, there is no question the Medical School would have taken the same action regardless of any additional, retaliatory motive. It actually did. But under a mixed-motive standard, it was held liable.

STATEMENT OF THE CASE

A. The Statutory Backdrop

Under Title VII, it is an "unlawful employment practice" to discriminate against an employee "because of [the] individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). It is also an "unlawful employment practice" to discriminate "because" an individual opposed a practice made unlawful under Title VII or participated in an investigation into allegedly unlawful conduct. *Id.* § 2000e-3(a). The latter type of discrimination is generally referred to as "retaliation." *Crawford v. Metro. Gov't*, 555 U.S. 271, 273 (2009).

This Court long understood § 2000e-2(a), the workhorse of Title VII's anti-discrimination provisions, to require an employee to prove that an unlawful consideration was outcome determinative. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506–07 (1993); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981). When an employee alleges that an employer's proffered reason for an employment action is pretextual, the burden of *production* may shift to the employer to articulate a legitimate, non-discriminatory reason for the action. *Burdine*, 450 U.S. at 253–56. If the employer does so,

the burden of production shifts back to the employee to disprove the proffered reason. *Id.* at 253. "The ultimate burden of *persuading* the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.*

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), a plurality of this Court adopted another burden-shifting regime under 42 U.S.C. § 2000e-2(a)(1). The plurality concluded that, if an employee shows that an impermissible consideration played a certain role in the employer's decision, the burden of persuasion shifts to the employer to disprove but-for causation—*i.e.*, to "prov[e] that it would have made the same decision even if it had not allowed [the impermissible consideration] to play such a role." *Price Waterhouse*, 490 U.S. at 244–45; *id.* at 261 (White, J., concurring in judgment); *id.* at 261 (O'Connor, J., concurring in judgment).

The Court divided over the circumstances in which the burden of proof would shift. Four Justices determined that the burden should shift when the plaintiff proved that discrimination was merely a "motivating" factor for the employment action, *id.* at 258 (plurality opinion); Justice White opined that the burden should shift when the plaintiff proved that discrimination was a "substantial factor," *id.* at 259–60; and Justice O'Connor concluded that the burden should shift only when the employee presented "direct evidence that an illegitimate criterion was a substantial factor in the [employment] decision," *id.* at 276.

In response, Congress partially codified and partially abrogated *Price Waterhouse*. The 1991 Civil

Rights Act amended Title VII's discrimination provision, 42 U.S.C. § 2000e-2, by stating that it is an unlawful employment practice to take an employment action motivated in part by the employee's membership in a protected class:

> **(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices**
>
> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

1991 CRA, § 107(a), 105 Stat. at 1075 (codified at 42 U.S.C. § 2000e-2(m)). Congress also established a limited affirmative defense to claims brought under that new provision:

> On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—
>
> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

Id. § 107(b), 105 Stat. at 1075–76 (codified at 42 U.S.C. § 2000e-5(g)(2)(B)). The 1991 CRA left Title VII's separate retaliation provision unchanged.

B. The Underlying Events

Nassar was an Assistant Professor of Internal Medicine and Infectious Diseases at the Medical School from November of 2001 until his resignation in July of 2006, effective September 1, 2006. Pet. App. 2, 5; JA 222.

1. *Nassar's Employment.* As a faculty member, Nassar worked full-time as the Associate Medical Director of the Amelia Court HIV-AIDS Clinic at Parkland Hospital, with which the Medical School was affiliated. Pet. App. 2; JA 168, 200. The clinic's Medical Director, Dr. Philip Keiser, supervised Nassar. Pet. App. 2; JA 179. Keiser's immediate supervisor was Dr. Beth Levine, the Chief of the Infectious Diseases Division of the Medical School. Pet. App. 2–3; JA 178. Levine oversaw the AIDS Clinic, but was seldom on site because she focused on research, not patient care. Pet. App. 3; JA 199–200.

Levine consistently gave Nassar the highest evaluation ratings, praising his clinician skills and work at the AIDS Clinic. JA 222–25; JA 397–402. In the fall of 2005, Levine suggested to Nassar that he seek a promotion. Pet. App. 3; JA 181. Levine supported Nassar during his promotion process by submitting a recommendation letter and endorsing a

recommendation submitted by Dr. Gregory Fitz, the Medical School's Chair of Internal Medicine. JA 184–88; JA 332–37; JA 338–43.

Nassar felt singled out by Levine. JA 200–01. He objected to some comments she had allegedly made about Middle Easterners, Pet. App. 3; was dissatisfied with Levine's approach to drafting his recommendation letter, JA 212–13; believed Levine attempted to delay his promotion, JA 183–84; JA 202–03; JA 211–13; and felt that Levine overly scrutinized his billing practices and productivity, JA 206.

On March 1, 2006, the Medical School decided to promote Nassar to Associate Professor, effective September 1, 2006. Pet. App. 4; JA 226; JA 344–45.

2. *Nassar's Request.* In March 2006, Nassar sought to become an employee of the Hospital instead of the Medical School, in part so that Levine would no longer be one of his supervisors. JA 123–24; JA 213–14. Nassar wanted to continue performing "exactly the same job" in the AIDS Clinic, but to give up his Medical School faculty position and work directly for the Hospital instead. JA 213–14.

Nassar first proposed his plan to Dr. Samuel Ross, the Hospital's Executive Vice President and Chief Medical Officer. JA 292–93. Ross discussed the plan with Nassar, Fitz, Keiser, and Sylvia Moreno, the Hospital's Director of HIV Services. JA 293; JA 316; JA 396. Ross knew that the Medical School's faculty members provide all physician care at the Hospital, in keeping with its status as a teaching hospital. *See* JA 294–95; JA 352. The

Affiliation Agreement between the two institutions, as well as the Hospital's rules, regulations, and bylaws, require that physicians working within the Hospital's geography, including the AIDS Clinic, be faculty members of the Medical School. JA 143–45; JA 294; JA 352.

Beginning in late March 2006, Fitz, whose approval was required, declined to approve Nassar's request to work full-time at the AIDS clinic without being a Medical School faculty member. JA 157; JA 219–20; JA 346–47; JA 396. Fitz explained at that time that the Affiliation Agreement, which had been in effect for over 27 years, precluded Nassar's proposed arrangement. JA 123–24; JA 346–47; JA 348. Ross communicated Fitz's decision to Nassar by e-mail on April 17, 2006. JA 316; JA 396.

Fitz met with Nassar on April 27, 2006, and recounted that meeting in an e-mail he sent later that day. JA 164–66; JA 346–47. Fitz referred to his meeting with Ross "a month or so ago" and reiterated that, "[a]s per [that] discussion, it would be against our operating agreement with [the Hospital] to have them employ faculty directly." JA 164–66; JA 346–47. Fitz stated that Nassar was "OK with this." JA 346–47. After this meeting, Nassar did not again discuss his proposed plan with Fitz, and Fitz believed that the matter had been settled. JA 164–66.

Unknown to Fitz, Nassar continued to communicate with Moreno about working directly for the Hospital. JA 55–56. In an e-mail to Nassar on April 27, 2006, Moreno stated that "[n]othing appears to have changed from the previous communication," but she told Nassar that if he were to resign from the

Medical School, there would be "no reason for [the Hospital] not to employ" him. JA 346. Without Fitz's knowledge, Moreno worked from May through July 2006 to process paperwork for the Hospital to hire Nassar. JA 56; JA 83; *see also* JA 173–78; JA 175–76.

By July 3, 2006, Moreno's efforts resulted in the preparation of an unsigned and unsent offer letter from the Hospital setting July 10, 2006 as Nassar's tentative employment start date. *See* JA 67–69; JA 314–15; *see also* JA 385. Moreno believed that the Hospital would eventually hire Nassar. JA 60; JA 91–92.

3. *Nassar's Resignation.* On July 3, 2006, believing he had secured employment by the Hospital, Nassar wrote a letter accusing Levine of discrimination and resigning from the Medical School effective September 1, 2006. JA 216; JA 311–13. In his letter, Nassar thanked Fitz "for all [his] support," described all interactions with Fitz as "pleasant and positive," and called Fitz "a very honorable person" who "always kept [his] promises to" Nassar. JA 313.

Ross did not sign the Hospital offer letter by Nassar's tentative start date of July 10, 2006, because the authorizations required for Nassar to secure full-time employment at the AIDS Clinic had not been obtained, including Fitz's approval. JA 300–03; JA 385. On July 10, Nassar wrote to Moreno that he had received "no offer letters and heared [sic] nothing from Sam Ross," and was therefore "going West." JA 385. Ross e-mailed Nassar the next day to ask him not to commit to

another job while Ross sought an "acceptable solution for all parties." JA 387.

Before the Hospital took further action, Nassar accepted another position on July 29, 2006. JA 286. He continued to work at the Medical School until he began his new job in California on September 1, 2006. JA 395.

4. *Fitz's Reaction.* Fitz first learned that Nassar was accusing Levine of illegal discrimination when he received Nassar's resignation letter on July 7, 2006. JA 105; JA 189–90; JA 191; JA 384. Fitz was "very saddened" and "shocked" because he "had not been aware of this sentiment" by Nassar. JA 129. The letter "completely surprised" and "disappointed" Fitz, who was uncertain of the basis for the letter. JA 191.

Fitz and Ross later met to discuss the AIDS Clinic. JA 298–300. During that meeting, Fitz told Ross in a matter-of-fact manner that Nassar had alleged discrimination and that the Medical School was following up on Nassar's claim. JA 298–300.

Keiser also met with Fitz after Nassar's resignation. JA 39. At trial, Keiser testified that Fitz told him that he had put a stop to Nassar's effort to be employed by the Hospital. JA 40–43. Keiser construed Fitz's remark to mean that Fitz did so in retaliation. JA 43–44.

C. The District Court Proceedings

In August 2008, Nassar brought this action in the Northern District of Texas, claiming that the Medical School had constructively discharged and

retaliated against him in violation of Title VII. Pet. App. 6. The Medical School asked the district court to instruct the jury that it could find the Medical School liable for retaliation only if that was the "but-for" cause of Fitz's actions, *i.e.*, only if Fitz would have approved Nassar's proposed employment at the Hospital in the absence of retaliatory animus. Pet. App. 112–15, 119. Pursuant to the Fifth Circuit's decision in *Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010), the district court rejected the Medical School's request. Pet. App. 47, 119.

During the liability phase of a bifurcated trial, the district court instructed the jury that Nassar had to prove only that retaliation was a motivating factor for Fitz's actions, *i.e.*, that Fitz "acted at least in part to retaliate." Pet. App. 47, 119. The jury found the Medical School liable for constructive discharge and retaliation. Pet. App. 2.

At the conclusion of the subsequent damages phase of the trial, *see* Pet. App. 6–7, the district court instructed the jury that the Medical School "is not liable for damages for actions where it shows by a preponderance of the evidence that it would have taken the same action even if [it] had not considered inappropriate factors." Pet. App. 42; *see also* Pet. App. 43. The jury concluded that the Medical School had not carried its burden on that affirmative defense and awarded Nassar $3,625,667.66. Pet. App. 44; *id.* at 6–7. The district court reduced the damages award to $738,167.66 and awarded $489,927.50 in attorney's fees. Pet. App. 35, 57; JA 287–88.

D. The Appellate Proceedings

The court of appeals reversed the constructive-discharge verdict because it was unsupported by the evidence, but upheld the retaliation verdict. Pet. App. 8–12. After disallowing some of Nassar's claimed damages, the court remanded for a new trial on damages for retaliation. Pet. App. 14–15.

The Medical School had argued that Fitz's decision not to approve Nassar's proposed employment arrangement was "a routine application" of the Affiliation Agreement. Pet. App. 11. The court of appeals determined, however, that the jury could have concluded under the mixed-motive instruction that Fitz acted "to punish Nassar for his complaints about Levine." Pet. App. 11.

The Medical School had also argued that "the district court reversibly erred in instructing the jury based on a theory of mixed-motive retaliation," but acknowledged that the panel was bound by the contrary decision in *Smith*. Pet. App. 63 (quoting Pet. C.A. Br. 42). The panel rejected that contention by stating in a footnote that it was bound by *Smith*. Pet. App. 12 n.16.

By a 9–6 vote, the court of appeals denied rehearing *en banc* on the mixed-motive jury instruction. Pet. App. 60. Judge Smith's dissent from denial of rehearing *en banc* emphasized that *Smith* was "an erroneous interpretation of the statute and controlling caselaw," including this Court's decision in *Gross*. Pet. App. 67.

SUMMARY OF ARGUMENT

1. Title VII prohibits adverse employment actions taken "because" of retaliation. 42 U.S.C. § 2000e-3(a). The statutory text bears but one reading: A plaintiff must prove that retaliation was the "reason" for a challenged employment action, *i.e.*, was its "but-for" cause. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009). That plain meaning comports with the settled, common-law default rule for tort suits.

The 1991 amendments to Title VII removed any doubt by specifically relieving plaintiffs of the burden of proving but-for causation for some types of discrimination, *but not retaliation*. Congress's selective tailoring of the 1991 amendments weighs heavily against construing Title VII's more general provisions to dispense with such a fundamental requirement.

In *Gross*, this Court already held that a materially identical employment statute requires plaintiffs to prove but-for causation. That decision controls.

2. Any other conclusion would restore chaos from order. Before *Gross*, the courts' efforts to apply mixed-motive burden shifting were plagued by uncertainties and practical difficulties. The need for a clearer, simpler system was widely recognized at the time, and *Gross* provided it. *Gross* likewise gave Congress clear drafting rules for expressing its intent if it wishes to amend the statutes. Nassar is now asking for a jurisprudential step backward.

3. A mixed-motive test for retaliation claims would also engender abuse and unfairness in a number of respects. This case illustrates those concerns. The undisputed, documentary evidence presented by both sides shows that the sole decisionmaker relied on a non-discriminatory policy to reach his decision, and announced that decision months *before* Nassar engaged in any protected activity that could support a retaliation claim. Yet Nassar prevailed under a mixed-motive standard.

ARGUMENT

I. A TITLE VII RETALIATION PLAINTIFF MUST PROVE THAT PROTECTED ACTIVITY WAS THE "BUT-FOR" CAUSE OF AN ADVERSE EMPLOYMENT DECISION.

A. Title VII's Text is Clear.

1. This case should begin and end with the statutory text. *See Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175–76 (2009). Title VII prohibits retaliation "because" the employee had engaged in protected activity. 42 U.S.C. § 2000e-3(a). "[B]ecause" means "by reason of: on account of." *Gross*, 557 U.S. at 176 (quoting 1 Webster's Third New International Dictionary 194 (1966)); *accord* 2 Oxford English Dictionary 41 (2d ed. 1989) ("for the reason that"); Random House Dictionary of the English Language 132 (1966) ("by reason; on account"). Thus, retaliation must have been "the 'reason' that the employer decided to act." *Gross*, 557 U.S. at 176; *see also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

Under that ordinary meaning, "the phrase 'because of' conveys the idea that the motive in question made a difference to the outcome," *Price Waterhouse*, 490 U.S. at 281 (Kennedy, J., dissenting), *i.e.*, was its "'but-for' cause." *Gross*, 557 U.S. at 176–77; *accord Price Waterhouse*, at 262–63 (O'Connor, J., concurring in judgment); *see also Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639, 652–53 (2008); *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 63–64 & n.14 (2007). If an employer took the same action it would have taken regardless of any retaliatory or discriminatory animus, it did exactly what the civil rights acts seek to achieve—equal treatment of all employees, regardless of whether they engaged in protected activity or belonged to a particular class. *See Price Waterhouse*, 490 U.S. at 282 (Kennedy, J., dissenting) (citing, *e.g.*, *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 683 (1983)); Interpretative Memorandum of Title VII of H.R. 7152 Submitted Jointly by Sens. Clark and Case, 110 Cong. Rec. 7212, 7213 (Apr. 8, 1964).

2. The common-law backdrop confirms the statute's plain meaning. Unless it clearly indicates otherwise, Congress intends its legislation to incorporate traditional tort principles. *See, e.g.*, *Meyer v. Holley*, 537 U.S. 280, 285 (2003). Thus, "[c]onventional rules of civil litigation generally apply in Title VII cases." *Price Waterhouse*, 490 U.S. at 253; *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003); *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983). Under the common law, "[a]n act or omission is not regarded as a cause of an event if the particular event would have

occurred without it." *Gross*, 557 U.S. at 176–77 (quoting W. Keeton, et al., Prosser and Keeton on Law of Torts 265 (5th ed. 1984)).

The common law further confirms that the plaintiff bears the burden of proof. "Absent some reason to believe that Congress intended otherwise, . . the burden of persuasion lies where it usually falls, upon the party seeking relief." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 57–58 (2005). Thus, "unless a statute provides otherwise, demonstrating but-for causation is [a] part of the plaintiff's burden in all suits under federal law." *Fairley v. Andrews*, 578 F.3d 518, 525–26 (7th Cir. 2008) (Easterbrook, J.).

Title VII is no exception, as this Court has "repeated[ly] admoni[shed] that the Title VII plaintiff at all times bears the 'ultimate burden of persuasion.'" *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993) (quoting *Aikens*, 460 U.S. at 716); *see also Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 258 (1981); *Patterson v. McLean Credit Union*, 491 U.S. 164, 187 (1989). When Congress wishes to shift that burden for a Title VII provision, it either says so expressly, *see* 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B), or makes the provision an affirmative defense to liability, as opposed to an element of the plaintiff's case, *see id.* § 2000e-2(e)(1); *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 91–92 (2008) (holding that defendants typically bear the burden of proof on affirmative defenses). Here, Congress did neither.

3. In *Price Waterhouse*, this Court cast some doubt on that conclusion by shifting the burden of

proof on but-for causation to the defendant—*i.e.*, requiring the defendant to disprove but-for causation—in a Title VII discrimination case. 490 U.S. at 244 (plurality opinion). But Congress subsequently clarified the question in the 1991 CRA by specifically authorizing mixed-motive claims for discrimination under 42 U.S.C. § 2000e-2(a) *but not for retaliation* under 42 U.S.C. § 2000e-3(a). 42 U.S.C. § 2000e-2(m).

Under the 1991 amendments, "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 1991 CRA, § 107(a), 105 Stat. at 1075, (codified at 42 U.S.C. § 2000e-2(m)). Critically, those prohibited motivating factors—"race, color, religion, sex, or national origin"—are the prohibited bases for discrimination under 42 U.S.C. § 2000e-2(a). They do not include retaliation under 42 U.S.C. § 2000e-3(a), the provision at issue here. Congress underscored that point by enacting this new mixed-motive prohibition as an amendment to Title VII's general discrimination provision, 42 U.S.C. § 2000e-2, and not to its retaliation provision, *id.* § 2000e-3(a).

That differential treatment is all the more notable because retaliation is itself a type of discrimination under Title VII. Section 2000e-2 forbids "discriminat[ion]" based on membership in the five protected classes noted above. *Id.* § 2000e-2(a). Title VII's retaliation provision, 42 U.S.C. § 2000e-3(a)—which is entitled "[d]iscrimination for

making charges, testifying, assisting, or participating in enforcement proceedings"—prohibits employers from "discriminat[ing]" against two other categories of employees: those who opposed a practice made unlawful under Title VII or participated in an investigation into allegedly unlawful conduct. Thus, the 1991 amendments specifically single out one of the two types of Title VII "discrimination" for special, mixed-motive treatment.

Because that differential treatment must be given effect, the courts of appeals have repeatedly held that the 1991 mixed-motive amendments do not apply to retaliation claims. *See Pennington v. City of Huntsville*, 261 F.3d 1262, 1269 (11th Cir. 2001); *Behne v. 3M Microtouch Sys., Inc.*, 11 F. App'x 856, 860 (9th Cir. 2001); *Norbeck v. Basin Elec. Power Coopinion*, 215 F.3d 848, 852 (8th Cir. 2000); *Kubicko v. Ogden Logistics Servs.*, 181 F.3d 544, 552 n.8 (4th Cir. 1999); *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 551–52 (10th Cir. 1999); *McNutt v. Bd. of Tr. of Univ. of Ill.*, 141 F.3d 706, 708–09 (7th Cir. 1998); *Thomas v. Nat'l Football League Players Ass'n*, 131 F.3d 198, 202–03 (D.C. Cir. 1997), *vacated in part on other grounds on panel rehearing by* 1998 WL 1988451 (D.C. Cir. Feb. 25, 1998); *Woodson v. Scott Paper Co.*, 109 F.3d 913, 935 (3d Cir. 1997); *Tanca v. Nordberg*, 98 F.3d 680, 684 (1st Cir. 1996); *Cosgrove v. Sears, Roebuck, & Co.*, 9 F.3d 1033, 1040 (2d Cir. 1993).

Congress's specific authorization of mixed-motive claims for a subset of Title VII claims confirms that Title VII's more general language prohibiting against discrimination and retaliation "because" of improper

factors does not authorize mixed-motive claims. If it did, § 2000e-2(m)'s specific motivating-factor provision would be surplusage, and its exclusion of retaliation would be inexplicable. *See Gross*, 557 U.S. at 178 n.5. The 1991 amendments therefore give rise to the "strongest" of inferences that mixed-motive claims are available only to the extent specifically authorized by § 2000e-2(m). *See id.* at 175 (quoting *Lindh v. Murphy*, 521 U.S.320, 330 (1997)).

Title VII is not unusual in this respect. When Congress has wished to authorize mixed-motive claims or to shift the burden of proof in such cases, it has done so expressly—not only in the 1991 amendments, but also in subsequent employment statutes. *See* Veterans' Benefits Improvement Act of 1996, Pub. L. No. 104-275, 110 Stat. 3322 (codified at 38 U.S.C. § 4311(c)) ("An employer shall be considered to have engaged in actions prohibited" if an employee's military service was "a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership."); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 2010 (codified at 12 U.S.C. § 5567(c)(3)(C)) (providing that if the protected activity was a "contributing factor" in challenged employment action, the burden of proof shifts to the defendant).

Indeed, when Congress created an affirmative defense to damages (but not other relief) for mixed-motive claims under Title VII, it limited that defense to "a claim in which an individual proves a violation

under section 2000e-2(m) of this title." 42 U.S.C. § 2000e-5(g)(2)(B). By limiting that defense to § 2000e-2(m) claims, Congress confirmed that mixed-motive claims are a creature of *that* specific statute, not of Title VII's more general sections, such as its retaliation provision. *See McNutt*, 141 F.3d at 708–09; *cf. Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). Congress's decision not to adopt the *Price Waterhouse* holding, but instead to craft this more nuanced affirmative defense, further confirms that departing from traditional burdens of proof is a matter for legislative tailoring, not judicial construction. *See Gross*, 557 U.S. at 174–75.

4. In contrast to its clear statutory text, Title VII's legislative history contains something for everyone, as the *Price Waterhouse* opinions demonstrate. *Compare Price Waterhouse*, 490 U.S. at 243–44 (plurality opinion), *with* 490 U.S. at 262 (O'Connor, J., concurring in judgment), *with* 490 U.S. at 286–87 & n.3 (Kennedy, J., dissenting). Read as a whole, however, the legislative history of the 1964 CRA "bears out what its plain language suggests: a substantive violation of the statute only occurs when consideration of an illegitimate criterion is the 'but-for' cause of an adverse employment action." *Price Waterhouse*, 490 U.S. at 262 (O'Connor, J., concurring in judgment). Indeed, the interpretive memorandum submitted by the bill's sponsors provided that a Title VII "plaintiff, *as in any civil case*, would have the burden of proving that discrimination had occurred." 110 Cong. Rec. 7214 (Apr. 4, 1964) (emphasis added).

The legislative history of the 1991 amendments does not disturb that conclusion for Title VII retaliation claims. Nothing in that legislative history states that Congress intended its mixed-motive amendments to govern such claims. Even if it did, legislative history could not modify the plain statutory text. *See Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1266 (2011).

B. *Gross* Is Indistinguishable.

The analysis above is not new; most of it comes straight out of *Gross*. In that case, this Court construed the ADEA's provision that "[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because* of such individual's age." 29 U.S.C. § 623(a)(1) (emphasis added).

As this Court has long recognized, the relevant provisions of Title VII and the ADEA are identical. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 & n.16 (1985). That is no accident: Congress modeled the ADEA on Title VII to such an extent that "the substantive provisions of the ADEA were derived *in haec verba* from Title VII." *Id.* (internal quotation marks omitted). Thus, parties and *amici curiae* on both sides of *Gross*, as well as the dissent, emphasized that the "relevant language in the two statutes is identical." *Gross*, 557 U.S. at 183 (Stevens, J., dissenting); *see also, e.g.*, Brief for the United States at 20, *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (Feb. 2, 2009), (No. 08-441) 2009 WL 253859.

As the Court observed, there is now one important textual difference between Title VII and the ADEA—the 1991 amendments authorize and tailor a mixed-motive analysis for some Title VII claims. As explained above, however, that difference does not affect Title VII retaliation claims. *See supra* at 17–20. Thus, the Title VII retaliation provision at issue here is indistinguishable from the ADEA provision construed in *Gross*. *Smith v. Xerox Corp.*, 602 F.3d 320, 336 (5th Cir. 2010) (Jolly, J., dissenting). Because they are identical, the two statutes must be construed the same—especially considering that they address closely related subject matter and that Congress modeled one after the other. *See, e.g.*, *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005); *see also Smith*, 602 F.3d at 336 (Jolly, J., dissenting). As Nassar himself has observed, Congress expects courts to construe identical language "in conformity." Br. in Opp. 15, 16 (quoting *Gomez-Perez v. Potter*, 553 U.S. 474, 488 (2008)).

Gross's reasoning confirms that conclusion. The Court relied on two main points. First, the "ordinary meaning of the ADEA's requirement that an employer took adverse action 'because of' age is that age was the 'reason' that the employer decided to act." 557 U.S. at 176. Second, "nothing in the statute's text indicates that Congress has carved out an exception" to the "general rule" that a plaintiff bears the burden of proving but-for causation. *Id.* at 177.

The same result follows here. Just as in *Gross*, the "ordinary meaning of the [statute's] requirement

that an employer took adverse action 'because of [protected activity] is that [protected activity] was the 'reason' that the employer decided to act." 557 U.S. at 176. And just as in *Gross*, Congress did not extend its motivating-factor amendments in the 1991 CRA to the provision at issue here. *See supra* at 17.

Gross gave considerable weight to the latter point because "Congress' careful tailoring of the 'motivating factor' claims" under Title VII did not extend to the ADEA. 557 U.S. at 178 n.5. Especially since Congress "contemporaneously amended the ADEA in several ways," its choice not to "make similar changes to the ADEA" could not be "ignore[d]." *Id.* at 174. So too here, Congress amended Title VII's retaliation provisions in 1991, and it has applied Title VII's remedial and other provisions to retaliation claims when it has wished to do so, before and after 1991. *See* 1991 CRA, § 102(a), 105 Stat. at 1072 (authorizing punitive damages for claims brought under § 2000e-3); 42 U.S.C. § 2000e-5(g)(2)(A) (authorizing reinstatement or hiring of an individual to remedy either discrimination or a "violation of section 2000e-3(a)"). Here, it did not.

If this Court had not already drawn the "strongest" of negative inferences from the 1991 amendments to Title VII in *Gross*, the inference might be even stronger here. *See Gross*, 557 U.S. at 175. *Gross* held that the 1991 amendments' limited authorization of mixed-motive claims gives rise to an inference that such claims are generally not authorized even outside of Title VII. *Id.* at 174–75. There is no basis for treating the same inference as being weaker *within* Title VII.

Neither the court of appeals nor Nassar has identified a plausible basis for distinguishing *Gross*. To the contrary, the Fifth Circuit "recognize[d] that the *Gross* reasoning could be applied in a similar manner to" Title VII's retaliation provision. *Smith*, 602 F.3d at 328. The court's reliance on the fact that *Gross* is an ADEA case instead of a Title VII case "is the equivalent of saying that a principle of negligence law developed in the wreck of a green car does not apply to a subsequent case because the subsequent car is red—a meaningless distinction indeed." *Id.* at 337 (Jolly, J., dissenting).

To be sure, courts must "be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." Br. in Opp. 11 (quoting *Gross*, 557 U.S. at 175). But that commonplace notion is a "red herring" here, *Palmquist v. Shinseki*, 689 F.3d 66, 74 (1st Cir. 2012), because any "careful and critical" examination reveals that the statutes are identical, as explained above.

II. FAILING FAITHFULLY TO APPLY *GROSS* AND THE TRADITIONAL BURDEN OF PROOF WOULD CREATE A JURISPRUDENTIAL MORASS.

As explained above, *Gross* is controlling because it construed a materially identical statute. A contrary conclusion would not only run afoul of fundamental canons of construction, it would reopen, and even stir, a jurisprudential can of worms this Court wisely closed in *Gross*.

A. *Price Waterhouse* Burden-Shifting Was Difficult And Confusing.

Justice Kennedy predicted more than 20 years ago that *Price Waterhouse*'s burden-shifting experiment would "result in confusion" and "more disarray in an area of the law already difficult for the bench and bar." 490 U.S. at 279 (Kennedy, J., dissenting). He was right: between *Price Waterhouse* and *Gross*, lower courts bemoaned "the murky water of shifting burdens in discrimination cases." *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1179 (2d Cir. 1992). The *Gross* Court therefore recognized that it had "become evident in the years since [*Price Waterhouse*] was decided that its burden-shifting framework is difficult to apply." 557 U.S. at 178–79. Indeed, "the problems associated" with *Price Waterhouse* were reason enough not to extend its framework to the ADEA. *Id.* at 179. If those problems warranted the holding in *Gross*, they certainly warrant faithful application of *Gross* to identical statutes.

1. *Price Waterhouse* arose in a narrow context: denial of partnership in an accounting firm where 32 partners had provided input and voted on the plaintiff. 490 U.S. at 233. The exact holding of *Price Waterhouse* has never been clear, in part because the plurality opinion for four Justices was coupled with two different opinions concurring in the judgment that set forth different standards. In general, "lower courts basically followed Justice O'Connor's approach as suggested by [the dissenting opinion of] Justice Kennedy." Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *is Dead,*

Whither McDonnell Douglas?, 53 EMORY L.J. 1887, 1910 (2004).

Although *Price Waterhouse* burden-shifting could have been "limited" to multiple-decisionmaker cases, *see* 490 U.S. at 280 (Kennedy, J., dissenting), it was not. And that produced unwarranted confusion and difficulty in a number of respects. *See Tyler*, 958 F.2d at 1180. Even commentators with pro-employee positions responded by calling for "a uniform method of proof for individual discrimination cases that focuses on the evidence and the inferences that can be drawn from that evidence, all without regard to differentiated rules regarding proof structures." Zimmer, *supra*, at 1891; *see also* Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 493 (2006).

The first problem was whether to apply the traditional *McDonnell Douglas* framework (under which the plaintiff retains the burden of persuasion) or, instead, to substitute *Price Waterhouse* burden-shifting in any given case. "At some point in the proceedings" the district court had to decide whether the case was a "pretext" case subject to the *McDonnell Douglas* framework or a "mixed-motive" case analyzed under *Price Waterhouse*. *See Price Waterhouse*, 490 U.S. at 247 n.12 (plurality opinion).

That was easier said than done, in part because "determining the precise holdings of *Price Waterhouse* is not an easy task." *Tyler*, 958 F.2d at 1182. The *Price Waterhouse* plurality and concurring opinions articulated different standards for when to shift the burden—*i.e.*, whether to do so when an

improper consideration was a "motivating" or "substantial" factor—and provided little guidance as to what qualified as "substantial." They likewise differed on the kind of evidence needed to support a finding of mixed motives, *i.e.*, whether that evidence must be "direct" or "substantial" (and what those terms mean), or whether any kind of evidence will do. *See Desert Palace*, 539 U.S. at 93–94; *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 582–83 (1st Cir. 1999). The lower courts had great "difficulties" with "discerning when a case merits a burden-shifting instruction as opposed to a burden-retaining instruction." *See* Catherine T. Struve, *Shifting Burdens: Discrimination Law Through the Lens of Jury Instructions*, 51 B.C. L. REV. 279, 297 (2010).

Because *Price Waterhouse* involved a bench trial, it did not wrestle with the further impracticality of applying its framework in a jury trial. 490 U.S. at 292 (Kennedy, J., dissenting). The parties to such trials were generally in the dark about whether the jury would receive a mixed-motive instruction until the end of trial—the only time when the judge could determine whether the plaintiff had produced the right quantum and type of evidence to merit a *Price Waterhouse* instruction. *See id.* at 247 n.12. Judges also found it "difficult to craft" jury instructions that clearly articulated the parties' respective and shifting burdens, and juries struggled to apply them in a coherent manner. *See, e.g.*, *Gross*, 557 U.S. at 178.

For those reasons, verdicts in *Price Waterhouse* cases were "supplanted by judgments notwithstanding the verdict or reversed on appeal more frequently than jury verdicts generally." *Gross*,

557 U.S. at 179 (quoting *Visser v. Packer Eng'g Assocs., Inc.*, 924 F.2d 655, 661 (7th Cir. 1991) (*en banc*) (Flaum, J., dissenting) (internal citation omitted) (discussing ADEA claims)).

B. *Gross* Established A Bright-Line, Easily Administrable Rule.

The complexity of *Price Waterhouse* stands in stark contrast to the simplicity of *Gross*. In individual cases, *Gross* is easy to apply. A plaintiff must prove that an improper factor was the but-for cause of an adverse employment action, and the familiar *McDonnell Douglas* framework governs that proof. There are no questions about whether to apply *McDonnell Douglas* or some other standard, no shifting in the burden of persuasion, and thus none of the uncertainties that dogged *Price Waterhouse*.

Under *Gross*, it is also easy to determine whether a plaintiff may proceed under a mixed-motive framework. Apart from the 1991 amendments to Title VII discussed above, all of the other major employment discrimination and retaliation statutes require a plaintiff to prove but-for causation.

Title VII retaliation, the ADEA, the Americans with Disabilities Act, and the Genetic Information Nondiscrimination Act of 2008 all prohibit actions taken "because" of an improper motive. *See, e.g.*, 42 U.S.C. § 2000e-2(a)(1) (Title VII); *id.* § 2000e-3(a) (Title VII); 29 U.S.C. § 623(a)(1) (ADEA); *id.* § 623(d) (ADEA); 42 U.S.C. § 12112(b)(4) (ADA); *id.* § 12203(a) (ADA); *id.* § 2000ff-1(a)(1) (GINA). Some of these statutes also prohibit discrimination "on the basis of"

a protected category or discrimination "based on" a protected activity. *See, e.g.*, 29 U.S.C. § 623(e) (ADEA); 42 U.S.C. § 12112(a) (ADA); *id.* § 2000e-2(e) (Title VII). As *Gross* held, the "statutory phrase, 'based on,' has the same meaning as the phrase, 'because of.'" *Gross*, 557 U.S. at 176 (discussing *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 63–64 & n.4 (2007)).

Because Congress has not separately authorized mixed-motive claims for any of those statutes, they all require a plaintiff to prove but-for causation under *Gross*. *See, e.g.*, *Lewis*, 681 F.3d at 318 (ADA); *Barton v. Zimmer*, 662 F.3d 448, 455–56 & n.3 (7th Cir. 2011) (ADA); *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 961–62 (7th Cir. 2010) (ADA). The Rehabilitation Act of 1973 similarly prohibits discrimination "solely by reason of [an individual's] disability," 29 U.S.C. § 294(a), which is at least as strict a standard as but-for causation. *See Lewis*, 681 F.3d at 314–15; *Palmquist*, 689 F.3d at 73–74.

Especially considering the relative simplicity of this statutory structure, resurrecting *Price Waterhouse* as an additional alternative would introduce an unwarranted amount of confusion and disparity in the system.[1] If Congress wished to

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[1] Because Congress enacted a specific burden-shifting regime for Title VII discrimination claims, juries now confront two different burdens of proof in cases where a plaintiff alleges violations of Title VII's discrimination prohibition and an additional statute, such as the ADEA. *See, e.g.*, *Anderson v. Durham D & M, LLC*, 606 F.3d 513, 515 & n.2 (8th Cir. 2010) (plaintiff brought claims of race discrimination under Title VII, § 1981, and the ADEA, as well as retaliation claims under § 1981, Title VII, and the ADEA); *Dowling v. Citizens Bank*, 295

amend the employment laws in this respect, it could easily and accurately express its intent so long as the drafting rules were clear, as they are under *Gross*. Instead, Congress has rejected proposals that would have abrogated *Gross* by authorizing mixed-motive claims under all of the major employment acts. *See* Protecting Older Workers Against Discrimination Act, S. 1756, 111th Cong. (2009); Protecting Older Workers Against Discrimination Act, H.R. 3721, 111th Cong. (2009); Protecting Older Workers Against Discrimination Act, S. 2189, 112th Cong. (2012).

C. Burden Shifting Invites Abuse and Unfairness.

Discrimination and retaliation laws are supposed to be "a shield against overtly illegal employer conduct, and not . . . a sword to threaten employers into wasteful prophylactic actions." Joseph J. Ward, *A Call for* Price Waterhouse *II: The Legacy of Justice O'Connor's Direct Evidence Requirement for Mixed-Motive Employment Discrimination Claims*, 61 ALB. L. REV. 627, 663 (1997); *see also Mattson v. Caterpillar, Inc.*, 359 F.3d 885, 890–91 (7th Cir. 2004). Mixed-motive claims often fall on the wrong side of that line, fundamentally transforming

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F. App'x 499, 502 n.1 (3d Cir. 2008) (plaintiff brought claims under the ADEA, Title VII, the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601 *et seq.*, and the ADA); *Joseph v. City of Dallas*, 277 F. App'x 436, 438 (5th Cir. 2008) (plaintiff brought claims under the ADEA, Title VII, and § 1983). Reviving the *Price Waterhouse* approach would increase the number of cases involving two or more different burdens of proof.

employment suits, driving up the cost of litigation, and forcing settlements of even meritless suits. While Congress is entitled to authorize such claims, the courts should not do so absent specific congressional authorization.

1. Mixed motives are easy to allege—any "stray remark" or hint of discriminatory animus might suffice. *Price Waterhouse*, 490 U.S. at 291 (Kennedy, J., dissenting). But they are difficult for defendants to disprove, in part because many employment decisions are inherently subjective.

Thus, "there is no denying that putting employers to the work of persuading factfinders that their choices are reasonable makes it harder and costlier to defend than if employers merely bore the burden of production." *Meacham*, 554 U.S. at 101. Empirical evidence confirms that plaintiffs recover "significantly more often" when courts give a "so-called motivating factor instruction" to the jury. David Sherwyn & Michael Heise, *The* Gross *Beast of Burden of Proof: Experimental Evidence on How the Burden of Proof Influences Employment Discrimination Case Outcomes*, 42 ARIZ. ST. L.J. 901, 944 (2010).

The difficulty of disproving subjective intent is compounded by the difficulty of securing summary judgment in mixed-motive cases. *See Burns v. Gadsden State Cmty. Coll.*, 908 F.2d 1512, 1519 (11th Cir. 1990). Mixed-motive claims are generally not susceptible to summary judgment because the plaintiff's burden is "so light." David A. Cathcart & Mark Snyderman, *The Civil Rights Act of 1991*, SF41 ALI-ABA 391, 432 (2001); *see also White v. Baxter*

Healthcare Corp., 533 F.3d 381, 402 (6th Cir. 2008); *Staten v. New Place Casino, LLC*, 187 F. App'x 350, 361–62 (5th Cir. 2006). Absent summary judgment, an employer must incur the full costs and risks of trial, where outcomes are uncertain. *See also* Katz, *Fundamental Incoherence*, *supra*, at 493. As such, employers face tremendous financial pressures to settle even meritless mixed-motive suits; failing to do so can be even more wasteful.

Instead of being a limited exception, moreover, mixed-motive suits could become the norm. Employment decisions "are almost always mixed-motive decisions turning on many factors." *See* Cathcart & Snyderman, *supra*, at 432. Thus, "every plaintiff is certain to ask for a" mixed-motive instruction. *Price Waterhouse*, 490 U.S. at 291 (Kennedy, J., dissenting); *see also Smith*, 602 F.3d at 333. Plaintiffs have little reason to shoulder the burden of proving "pretext" under *McDonnell Douglas* when they could instead rely on the "easier burden of persuasion" that allows "plaintiffs [to] win more." Zimmer, *supra*, at 1922 n.152, 1943.

Thus, between this Court's decisions in *Price Waterhouse* and *Gross*, commentators predicted the death of the *McDonnell Douglas* framework. *See* Zimmer, *supra*; William R. Corbett, McDonnell Douglas, *1973–2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199 (2003); Kenneth R. Davis, *Price-Fixing: Refining the* Price Waterhouse *Standard and Individual Disparate Treatment Law*, 31 FLA. ST. U. L. REV. 859 (2004); Jeffrey A. Van Detta, *"Le Roi Est Mort; Vive Le Roi!": An Essay on the Quiet Demise of* McDonnell Douglas *and the*

Transformation of Every Title VII Case After Desert Palace, Inc. v. Costa *into a "Mixed-Motives" Case*, 52 DRAKE L. REV. 71 (2003).

2. These problems are especially acute in the retaliation context. While an employee's membership in a protected class is generally outside of his or her control, the decision to engage in protected activity is not, and can be manipulated to the employee's advantage. *All* employees could seek to protect themselves against adverse employment actions by alleging discrimination (against themselves or others, *see Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 579–80 (6th Cir. 2000)), thereby bringing themselves within the protection of § 2000e-3(a). Their claims may be wholly without merit. But the timing of their allegations and the circumstances of any adverse employment actions (even seemingly innocuous ones) may allow a jury to infer retaliation—which is what happened in this case. *See infra* at 35–37.

This concern is accentuated by the recent proliferation of retaliation claims. *See Crawford v. Metro. Gov't of Nashville & Davidson Cnty. Tenn.*, 555 U.S. 271, 283 (2009) (Alito, J., concurring). In Fiscal Year (FY) 2009, 36% of all charges filed with the EEOC included allegations of retaliation in the workplace, surpassing for the first time the number of charges of race discrimination. U.S. E.E.O.C., Charge Statistics FY 1997-FY 2012, *available at* http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Mar. 4, 2013). That trend has continued; the following year, for example, retaliation charges increased by nearly 8%, and last year 38.1%

of all charges filed contained retaliation allegations. U.S. E.E.O.C., Retaliation Based Charges FY 1997-FY 2012, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/retaliation.cfm (last visited Mar. 4, 2013). Allegations of retaliatory animus should not become an easy means of forcing employers to trial.

3. Mixed-motive retaliation claims pose an especially serious problem where, as here, an employer took action based on a straightforward and non-discriminatory written policy, but an employee claims that one of his or her supervisors felt some improper animus. *Cf. Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1193–94 (2011). Activity protected by the retaliation statutes may well upset some of the people involved. Indeed, in the modern workplace, "it will often be possible for an aggrieved employee or applicant to find someone whose input into the process was in some way motivated by an impermissible factor." Cathcart & Snyderman, *supra* at 432. But Title VII does not prohibit feelings (which are generally protected by the First Amendment); it prohibits actual acts of retaliation. 42 U.S.C. § 2000e-3(a); *see Price Waterhouse*, 490 U.S. at 262 (O'Connor, J., concurring in judgment); *id.* at 282 (Kennedy, J., dissenting).

If inferences of retaliation could be drawn based on an individual supervisor's emotional reaction to an accusation of wrongdoing—even when a written policy *required* the supervisor to take the action in question—there is little an employer could do to protect itself from costly lawsuits and settlements, short of giving preferential treatment to anyone who

had engaged in protected activity (or even belonged to a protected class). But the laws require only evenhanded, not preferential, treatment. *See Burdine*, 450 U.S. at 259; *see also Price Waterhouse*, 490 U.S. at 274 (O'Connor, J., concurring in judgment); 42 U.S.C. § 2000e-2(j). An unrealistic burden of proof should not be used to effectively change that substantive standard of care, especially considering that Title VII draws a careful balance between deterring discrimination and retaliation, on the one hand, while "preserv[ing] . . . an employer's remaining freedom of choice," on the other. *Price Waterhouse*, 490 U.S. at 242 (plurality opinion).

III. UNDER A BUT-FOR STANDARD OF CAUSATION, THE MEDICAL SCHOOL IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

This case illustrates the problems with a mixed-motive approach. Nassar was able to secure a sizeable recovery on a retaliation claim even though he pursued no viable discrimination claim and even though the evidence showed that the Medical School would have taken the same action regardless of his protected activity—indeed, the Medical School had previously done just that.

1. The Medical School presented undisputed documentary evidence that, before any alleged impetus for retaliation ever arose, it had consistently opposed Nassar's desire to work for the Hospital's AIDS Clinic without being a Medical School faculty member. *See supra* at 7–9. Indeed, Nassar introduced and relied upon the same evidence. *Compare* JA 316 *with* JA 396. The Medical School

based its decision on the Affiliation Agreement between the Medical School and the Hospital, an agreement that is, without question, a non-discriminatory policy. JA 346–47; JA 352.

Fitz, the employee charged with retaliation, first announced his determination in March 2006. JA 220–21; JA 346–47; JA 396. At that time, Fitz informed Nassar that the Affiliation Agreement, as well as the Hospital's bylaws, rules, and regulations, required that a physician seeking regular employment within the Hospital's geography (including the AIDS Clinic) be employed by the Medical School. JA 123–24; JA 346–47. He discussed that decision with Nassar again at the end of April 2006. JA 346–47.

It is also uncontroverted that Fitz did not learn that Nassar had claimed illegal discrimination until he received Nassar's resignation letter on July 7, 2006. Pet. App. 5–6; JA 129; JA 189–90; JA 191; JA 384. Even if Fitz developed any retaliatory animus against Nassar at that time, it came months after he had made and (at least twice) announced his decision. JA 346–47.

In the lower courts, Nassar questioned whether Fitz had correctly construed the Affiliation Agreement and the settled course of conduct between the Hospital and the Medical School. *See, e.g.*, JA 108–09; JA 114. Fitz did. JA 346–47. But even if he had not, that would be irrelevant—the question turns on why Fitz made his decision, not on whether his understanding of the agreement was correct. Title VII prohibits actions made in retaliation, not in error. *See, e.g.*, *Pulczinski v. Trinity Structural*

Towers, Inc., 691 F.3d 996, 1003 (8th Cir. 2012); *Giannapoulos v. Brach & Brock Confections, Inc.*, 109 F.3d 4406, 410–11 (7th Cir. 1997). As explained above, Fitz made and announced his decision before any occasion for retaliation even entered the picture.

In post-trial briefing, Nassar tried to back-date his protected activity by alleging that he complained about Levine in late 2005 and early 2006 before Fitz made and announced his decision in March 2006. *See* Br. in Opp. at 6. But Nassar never charged the Medical School with retaliation based on those complaints; he cited only his subsequent resignation letter and a complaint to Fitz at the end of April 2006 as the protected impetuses for retaliation. *See, e.g.*, JA 33–35; JA 258; JA 391–94. And he did so for good reason: Those earlier complaints did not allege discrimination on the basis of race, ethnicity, or religion, and thus did not constitute protected activity as a matter of law. *See, e.g., Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 349 (5th Cir. 2007); *Tomanovich v. City of Indianapolis*, 457 F.3d 656, 663 (7th Cir. 2006).

2. Even under an erroneous mixed-motive standard, the district court observed that "[t]he defense has put forth a strong defense . . . based upon this [A]ffiliation [A]greement." Pet. App. 115. Under the correct legal standard, it should have been a winning defense, and the Medical School is entitled to judgment as a matter of law. Although the question presented concerns the correct legal standard, this Court has discretion to apply that standard and direct the entry of judgment as a matter of law. *See Consolidated Rail Corp. v.*

Gottshall, 512 U.S. 532, 558 (1994); *Strickland v. Washington*, 466 U.S. 668, 698–701 (1984); *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 716 (1986) (Stevens, J., dissenting). The Court should do so to demonstrate the reasons for rejecting a mixed-motive approach and because the correct result is so clear.

CONCLUSION

For the foregoing reasons, this Court should vacate and remand.

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29 U.S.C. § 623

Prohibition of Age Discrimination

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

42 U.S.C. § 2000e-2(a)

Unlawful Employment Practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(m)

Unlawful Employment Practices

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-3(a)

Other Unlawful Employment Practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-5(g)

Enforcement Provisions

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex,

or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)),and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

42 U.S.C. § 12112(a)

Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a) (2007)

Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

No. 12-484

IN THE
Supreme Court of the United States

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER,

Petitioner,

v.

NAIEL NASSAR, M.D.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED

Whether a plaintiff establishes a violation of Title VII's retaliation provision when the plaintiff proves that the defendant acted at least in part to retaliate and the defendant fails to prove that it would have taken the same action absent the retaliatory motive.

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930 F.2d 9 (8th Cir. 1991). 22

Williams v. Mallinckrodt, Inc.,
892 F.2d 75 (4th Cir. 1989). 22

STATUTORY MATERIALS AND RULES

Civil Rights Act of 1991,
Pub. L. No. 102-166, 105 Stat. 1071. 1, 12, 17, 18

Title VII of the Civil Rights Act of 1964,
42 U.S.C. § 2000e *et seq.*. 8
42 U.S.C. § 2000e-2. 18
42 U.S.C. § 2000e-2(a). 2, 12, 22
42 U.S.C. § 2000e-2(m). *passim*
42 U.S.C. § 2000e-3. 19
42 U.S.C. § 2000e-3(a). 2, 16, 21, 22, 24
42 U.S.C. § 2000e-5(g)(2)(A). 18
42 U.S.C. § 2000e-5(g)(2)(B). 1, 3, 12

Age Discrimination in Employment Act of 1967,
29 U.S.C. § 623(f). 13, 26

42 U.S.C. § 1981. 16, 18

42 U.S.C. § 1982. 17

Federal Rule of Civil Procedure 51. 14

H.R. Rep. No. 102-40 (II) (1991), *reprinted in* 1991 U.S. Code Cong. & Admin. News 693. 18

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EEOC Compliance Manual. 20

Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory, EEOC Directives Transmittal No. 915.022 (July 14, 1992). 20

INTRODUCTION

Adverse employment actions often have multiple causes, and it is well settled that a plaintiff can establish a violation of Title VII when an unlawful motive is not the sole cause of the defendant's action. The issue in this case is how a plaintiff establishes retaliation in violation of Title VII when the defendant's adverse action has both lawful and unlawful motivations.

For over two decades, nearly every court that addressed the issue has held that when a Title VII plaintiff shows that an unlawful employment practice was a motivating factor for the defendant's action, the burden of proof shifts to the defendant to attempt to prove, as an affirmative defense, that it would have made the same decision even absent the impermissible motive. This burden-shifting framework was articulated in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and under *Price Waterhouse*, a defendant's same-decision showing is a complete defense to liability. In 1991, Congress amended Title VII in part to codify *Price Waterhouse* burden-shifting, but also to provide that a defendant's same-decision showing limits the relief available to the plaintiff but does not prevent a finding of liability. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1075-76; 42 U.S.C. §§ 2000e–2(m) & 2000e-5(g)(2)(B).

Petitioner University of Texas Southwestern Medical Center (UTSW) urges this Court to reject burden-shifting for Title VII retaliation claims because the pertinent 1991 amendments do not explicitly refer to retaliation, and because the Court declined to extend the burden-shifting framework to claims brought under the Age Discrimination in Employment Act (ADEA). *See Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009). UTSW fails to

recognize, however, that, if it is correct that the 1991 amendments changed nothing with respect to retaliation claims—a position with which we disagree—*Price Waterhouse* continues to control such cases. Because the jury here found that UTSW had not shown that it would have taken the challenged action absent a retaliatory motive, respondent Dr. Nassar will prevail and be entitled to the same relief regardless of whether the 1991 amendments or *Price Waterhouse* applies.

Moreover, and contrary to UTSW's assertions, UTSW would not be entitled to judgment as a matter of law even if the Court were to adopt the *Gross* standard for Title VII retaliation claims. Under that standard, the burden of proof would be on Dr. Nassar to establish but-for causation, and a jury would have to decide in the first instance whether he met that burden.

The Court should affirm the decision of the Fifth Circuit on either of the alternative bases discussed below.

STATEMENT OF THE CASE

A. Legal Background

Title VII provides that it is an "unlawful employment practice . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(a). Title VII also provides that it is an "unlawful employment practice to discriminate" against an individual because that individual opposes a practice that violates Title VII. *Id.* § 2000e-3(a).

In *Price Waterhouse v. Hopkins*, the Court held that when a plaintiff in a Title VII case proves that discrimination "played a motivating part in an employment

decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision" even without the unlawful motive. 490 U.S. at 258 (plurality); *see id.* at 259–60 (White, J., concurring); *id.* at 276 (O'Connor, J., concurring). The principal debate in *Price Waterhouse* concerned the "allocation of the burden of persuasion on the issue of causation." *Id.* at 263 (O'Connor, J., concurring). The Court rejected the view that a Title VII plaintiff has the burden of proving but-for causation in a mixed-motives case. Instead, the Court held that once the plaintiff shows that discrimination was a motivating factor, the burden shifts to the defendant to negate but-for causation by proving that it would have made the same decision even without the discriminatory motive. Under *Price Waterhouse*, a defendant's same-decision showing is a complete defense to liability. *Id.* at 242 (plurality); *see id.* at 261 (White, J., concurring); *id.* at 261-62 (O'Connor, J., concurring). Nothing in *Price Waterhouse* explicitly or implicitly limits its holding so as to render it inapplicable to claims of retaliation, which under Title VII is a species of unlawfully motivated discrimination.

In 1991, Congress amended Title VII to provide that a plaintiff establishes a violation of the statute by showing that discrimination was a motivating factor for the defendant's adverse employment decision, and that a defendant's same-decision showing limits the relief available but does not provide a complete defense to liability. *See* 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B). Thus, the 1991 amendments partially codified and partially abrogated *Price Waterhouse*. This Court has not decided whether the motivating-factor amendments in the 1991 Civil Rights Act apply to discrimination based on protected

activity (i.e., retaliation), or only to discrimination based on protected characteristics. If the 1991 amendments do not cover retaliation, retaliation claims would continue to be governed by *Price Waterhouse*. *See Smith v. Xerox Corp.*, 602 F.3d 320, 329 (5th Cir. 2010); *accord Saridakis v. S. Broward Hosp. Dist.*, 468 F. App'x 926, 931 (11th Cir. 2012).

In *Gross*, the Court rejected the application of burden-shifting to cases brought under the ADEA, explaining that courts "'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.'" 557 U.S. at 175 (quoting *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008)). *Gross* did not address retaliation claims under Title VII.

B. Factual Background

Dr. Naiel Nassar, an expert in infectious diseases and a specialist in HIV/AIDS treatment, is of Middle Eastern descent. Pet. App. 2; R. 2324-29[1]. Dr. Nassar was a faculty member at UTSW from 1995 to 1998, and from 2001 to 2006. Pet. App. 2. UTSW is affiliated with Parkland Hospital, and UTSW faculty make up most of the Hospital's physician staff. *Id.* Beginning in 2001, Dr. Nassar worked as the Associate Medical Director of Parkland's Amelia Court Clinic. *Id.*

Until 2004, Dr. Nassar worked at Parkland without incident, under the immediate supervision of Dr. Phillip Keiser, the Clinic's Medical Director. JA 125; R. 2360. In June 2004, UTSW hired Dr. Beth Levine to oversee the Clinic and supervise Dr. Keiser. Pet. App. 2-3.

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[1] R. citations are to the Fifth Circuit Record.

From the start, Levine treated Dr. Nassar differently than she treated his colleagues. Before she was hired, Levine interviewed the faculty who would be under her supervision if she came to UTSW. R. 2926-28. Although she spoke with other staff members for fifteen or twenty minutes each, Levine questioned Dr. Nassar for an hour and a half, reviewing every detail of his resume and reading from a long list of pre-written questions that she asked no one else. *Id.*

After Levine started at UTSW, she became irrationally convinced that Dr. Nassar was not working as hard as the other doctors. Pet. App. 3; R. 2360-62. She expressed concern to Keiser about Dr. Nassar's productivity, much more so than she did about any other doctor. Pet. App. 3. When Keiser presented Levine with objective data demonstrating Dr. Nassar's high productivity and effectiveness, Levine began criticizing Dr. Nassar for under-billing. *Id.* Her criticism did not take into account the fact, of which Levine was aware, that Dr. Nassar's salary was funded by a federal grant that precluded billing for most of his services. *Id.* On a number of occasions, Dr. Nassar met with Dr. Gregory Fitz, UTSW's Chair of Internal Medicine and Levine's supervisor, to complain about Levine's unwarranted and unusual scrutiny. *Id.* at 4; JA 191-92, 206-10.

In late 2005, when UTSW considered hiring Dr. Muhammad Akbar, another physician of Middle Eastern descent, Levine said in Dr. Nassar's presence that "Middle Easterners are lazy." Pet. App. 3. Levine successfully opposed the hiring of Akbar by UTSW. *See* R. 2383-2400. After Parkland hired Akbar independently of UTSW, JA 38-39, Levine remarked in Keiser's presence that Parkland

had "hired another one," Pet. App. 3. Keiser took "another one" to mean "another person . . . who is Muslim and who is dark-skinned." *Id*; R. 2400.

Because of Levine's racially-motivated harassment, Dr. Nassar looked for a way to continue working at the Clinic without being a UTSW faculty member under Levine's supervision. Pet. App. 4. Specifically, beginning in 2005, Dr. Nassar began exploring the possibility of working directly for Parkland. Dr. Nassar's efforts to switch his employer from UTSW to Parkland were initially unsuccessful because Fitz did not support the change, but both Dr. Nassar and Parkland staff continued to pursue the goal of having Dr. Nassar work at the Clinic as a Parkland employee. JA 67-71, 214-16, 326-30.

Parkland staff told Dr. Nassar that if he resigned from his UTSW position, Parkland would hire him to work directly for the Clinic. Pet. App. 5. On June 3, 2006, Parkland verbally offered Dr. Nassar a job as a staff physician on Parkland's payroll. *Id.*; JA 215-16, 236, 245-50. In July 2006, Parkland employees exchanged emails between themselves and Dr. Nassar detailing the steps Dr. Nassar needed to take to finalize his employment. JA 67-71, 326-27. Parkland negotiated a salary for Dr. Nassar, JA 215-16, completed an internal administrative form designating that salary, JA 328-30, and prepared a formal offer letter, JA 314-15.

Believing that he had a firm job offer from Parkland, Dr. Nassar resigned from UTSW on July 3. Pet. App. 5. In his resignation letter to Fitz and other UTSW faculty, Dr. Nassar wrote that "[t]he primary reason of my resignation is the continuing harassment and discrimination against me by . . . Dr. Beth Levine." *Id.*; JA 311-13, 387. Levine's

behavior, he wrote, "stems from religious, racial and cultural bias against Arabs and Muslims that has resulted in a hostile work environment." Pet. App. 5.

Fitz then moved to block Parkland from hiring Dr. Nassar. *Id.*; JA 120-21. Dr. Samuel Ross, Parkland's Chief Medical Officer, met with Fitz after Dr. Nassar's resignation and discussed the allegations of discrimination. JA 298. Soon thereafter, Parkland revoked the employment offer, and Dr. Nassar then accepted a position at a smaller clinic in Fresno, California. Pet. App. 5-6; R. 2963-64. In response to an e-mail from Dr. Nassar about the Fresno position, Ross responded that Nassar should not commit to leaving Parkland "just yet" because "many conversations are going on to try to resolve this issue." JA 387; *see also id.* at 331 (e-mail from one Parkland employee to another saying Dr. Nassar should "sit tight" because the issue is "being addressed").

Fitz admitted to Keiser that he blocked Dr. Nassar's employment at Parkland in retaliation for the resignation letter. Pet. App. 5, 11; JA 39-45. Fitz told Keiser that Levine was "publicly humiliated" by Dr. Nassar's charges and needed to be "publicly exonerated." JA 41. Keiser reported the conversation to Vernon Mullen, UTSW's Equal Opportunity Officer. *Id.* at 45–46. Mullen told Keiser that, "after sending a letter like this, Dr. Nassar could no longer continue to work here." *Id.* at 45.

Parkland corroborated Keiser's account, explaining in its submission to the EEOC that "[Ross] contacted [Fitz] to discuss [Dr. Nassar] and his potential hire by Parkland Health & Hospital System." JA 322-23. Fitz "informed Dr. Ross that [Dr. Nassar] made allegations against Dr.

Levine and asked that Dr. Ross give him an opportunity to look into the matter." *Id.*

C. Proceedings Below

1. Dr. Nassar filed a charge with the EEOC, which found "credible, testimonial evidence" that UTSW had retaliated against Dr. Nassar for his allegations of discrimination. Pl. Trial Ex. 78. Dr. Nassar filed suit, alleging, as relevant here, that UTSW constructively discharged him on account of race or national origin and retaliated against him for his complaints of discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Pet. App. 6.

On May 3, 2010, UTSW submitted proposed jury instructions that included a mixed-motive charge on the retaliation claim. Pet. App. 103-04. In a footnote, UTSW incorrectly stated that Fifth Circuit law on the causation standard was "unsettled," citing two unpublished decisions, both of which preceded *Gross*. *Id.* at 104 n.8. The footnote failed to cite the Fifth Circuit's decision in *Smith*, 602 F.3d 320, decided more than a month earlier, which held that a mixed-motive instruction was appropriate in a Title VII retaliation case. UTSW nonetheless proposed a mixed-motive instruction, consistent with *Smith*.

On May 21, 2010, the district court held a charge conference that lasted the entire afternoon. R. 3283-3325; JA 262-74. During the conference, UTSW did not object to the mixed-motive instruction. At the conclusion of the conference, the district court stated that no further objections would be entertained. *See* JA 273 ("Anything else? I'm telling you now, no new objections."). On May 24, just before the jury was to be charged, UTSW attempted

to raise a new objection to the mixed-motive charge, explaining that "we have had a little more time to go and look a little more closely into some case law." Pet. App. 108; *see* R. 3330-52. The district court stated that UTSW "probably ha[d] waived" the objection and that the court found it "a little more than dismaying" and "unprofessional" to attempt to raise a new objection after the court had concluded the charge conference and the deadline for objections had passed. Pet. App. 109-10.

The district court instructed the jury that Dr. Nassar had the burden to prove that his protected characteristics and protected activities were motivating factors for UTSW's conduct, even though other factors might also have motivated UTSW. The jury returned a verdict for Dr. Nassar, finding that his resignation from UTSW was the result of a racially-motivated constructive discharge and that UTSW blocked Parkland from hiring him in retaliation for his complaints of discrimination. *Id.* at 6, 47-48.

After the jury returned a verdict for Dr. Nassar on liability, the trial entered the relief stage. The district court instructed the jury on an affirmative defense—that if UTSW proved that it would have stopped Parkland from hiring Dr. Nassar even absent a retaliatory motive, then UTSW would not be liable for damages or backpay. Pet. App. 42. Attempting to make such a showing, UTSW argued to the jury that Fitz made his decision to block Parkland from hiring Dr. Nassar in April 2006, well before Dr. Nassar sent his resignation letter, on the basis of a 1979 agreement between UTSW and Parkland. *Id.* at 5, 11; R. 3664-70. The jury rejected UTSW's affirmative defense and found that UTSW had failed to prove that it would

have blocked Dr. Nassar's hiring at Parkland even if it had not considered Dr. Nassar's protected activity. Pet. App. 43-44.

The jury awarded Dr. Nassar $436,168 in backpay and $3,187,500 in compensatory damages. *Id.* The district court reduced the damages to $300,000 in accordance with Title VII's cap on such damages. *Id.* at 7. UTSW moved for a directed verdict on the affirmative defense, reiterating its argument that it would have made the same decision based on the 1979 agreement. JA 261-62. The district court denied the motion, stating that there was a "great deal of evidence on both sides of the case." *Id.*

2. UTSW appealed, and the Fifth Circuit upheld the verdict in part. The court of appeals reversed the constructive discharge verdict, holding that although "Dr. Nassar proved that Levine racially harassed him," he did not prove an aggravating factor necessary for constructive discharge. Pet. App. 10. The court upheld the retaliation verdict, holding that Dr. Nassar offered sufficient proof that UTSW prevented Parkland from hiring him "to punish Nassar for his complaints about Levine." *Id.* at 11. The court explained that the jury "heard conflicting evidence about the timing and motivation of Fitz's opposition" to Parkland's hiring of Dr. Nassar and "resolved the conflict against UTSW." *Id.* at 5, 11.

In a footnote, the Fifth Circuit acknowledged that "UTSW [] urges error based on the jury having been instructed on a mixed-motive theory of retaliation," but noted that UTSW conceded that the instruction was correct under controlling precedent. *Id.* at 12 n.16 (citing *Smith*, 602 F.3d at 330). The court remanded for a

reduction of the damages in accordance with its decision. *Id.* at 15.

3. UTSW petitioned for panel rehearing and rehearing en banc, asking the Fifth Circuit to overrule *Smith*. The panel denied rehearing and the court denied rehearing en banc. Judge Elrod, a member of the original panel, concurred, noting that she "agree[d] with the district court" that UTSW had waived its objection to the jury instruction by not submitting a different proposed jury instruction and by not raising the objection during the charge conference. *Id.* at 61-62. Judge Elrod stated that although the waiver question was not necessary to the panel opinion—because UTSW conceded that its objection was foreclosed by *Smith*—it was "dispositive" of her decision to vote against rehearing en banc. *Id.*

Judge Smith dissented, urging the panel, on the motion for panel rehearing, to address the waiver issue expressly, rather than passing on it "*sub silentio*," because of the importance of the underlying issue. *Id.* at 63. He stated that UTSW "[a]t least . . . presents a strong argument" that the issue was not waived and that the panel—on a motion for rehearing—could decide "one way or the other." *Id.* at 65 n.1. And he explained that it was necessary for the panel to decide the waiver issue because "UTSW is not entitled to raise a waived claim." *Id.* at 65.

SUMMARY OF ARGUMENT

The Court should not reach the merits of this case because UTSW forfeited its challenge to the mixed-motive jury instruction. If the Court does reach the merits, either of two alternative holdings should resolve this case in Dr.

Nassar's favor because the jury rejected UTSW's same-decision defense.

The 1991 Civil Rights Act added sections 703(m) and 706(g)(2)(B) to Title VII, codifying a mixed-motive standard paired with a limited-remedy affirmative defense. *See* 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B). Those amendments apply to both discrimination and retaliation claims. The 1991 amendments provide that "an unlawful employment practice is established where the [employee] demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice." *Id.* § 2000e-2(m). Under this Court's precedents, retaliation for opposing discrimination on the basis of a protected characteristic is itself discrimination on that basis. Therefore, an unlawful employment practice is established where the employee demonstrates that retaliation for opposing race, color, religion, sex, or national origin discrimination was a motivating factor for the employer's action. This interpretation not only makes sense, because there is no reason to treat retaliation claims differently from substantive discrimination claims, but also accords with the EEOC's long-held view.

In the alternative, if UTSW is correct that the 1991 amendments apply only to substantive discrimination and not retaliation, then retaliation claims continue to be governed by *Price Waterhouse* burden-shifting. *Price Waterhouse* interpreted the meaning of the words "because of" in the discrimination provision of Title VII, 42 U.S.C. § 2000e-2(a), an interpretation that applies to other uses of that phrase within the same statute. In the two years between the Court's decision and the 1991 amendments, the lower courts recognized that *Price*

Waterhouse applies to retaliation claims. And after the 1991 amendments, most courts held that *Price Waterhouse* continues to apply to retaliation claims.

Contrary to UTSW's assertion, *Gross* did not alter mixed-motive analysis in Title VII cases. *Gross* did not overrule *Price Waterhouse*; rather, *Gross* held that *Price Waterhouse* does not apply to cases under the ADEA, and explained that courts "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." *Gross*, 557 U.S. at 174 (quoting *Fed. Express*, 552 U.S. at 393). That principle counsels against applying *Gross* to Title VII cases, given the substantive differences between the ADEA and Title VII. For instance, the ADEA includes a provision addressing mixed-motive cases that immunizes a decision based on age where that decision was also based on "reasonable factors other than age," 29 U.S.C. § 623(f), but Title VII includes no such language. And this Court has recognized that age discrimination is categorically different than discrimination on the basis of the characteristics protected by Title VII and has not always interpreted the ADEA and Title VII uniformly. If anything, *Gross* further decoupled the two statutes.

Finally, if this Court holds that Dr. Nassar has the burden of proving but-for causation, this case should be remanded for a new trial. The trial record belies UTSW's argument that the outcome of this case would necessarily be different if Dr. Nassar had the burden of proving but-for causation. Indeed, given that the jury found that UTSW failed to show that it would have made the same decision absent retaliation, there is every reason to believe that a jury instructed under the *Gross* standard would find

for Dr. Nassar. UTSW's argument for judgment as a matter of law is in essence a renewed challenge to the evidence supporting the verdict—a challenge already rejected by both courts below.

ARGUMENT

I. UTSW Forfeited Its Challenge to the Mixed-Motive Jury Instruction.

To preserve an objection to the jury instruction, UTSW was required to state its objection on the record at the time established by the district court for such objections, and to submit in writing a proposed alternate instruction. *See* Fed. R. Civ. P. 51; *Kanida v. Gulf Coast Med. Pers. LP*, 363 F.3d 568, 580 (5th Cir. 2004). Because UTSW met neither of these requirements, the writ should be dismissed as improvidently granted. *See City of Springfield v. Kibbe*, 480 U.S. 257, 258-60 (1987).

UTSW's proposed instructions included a mixed-motive charge—the charge it now seeks to contest. Pet. App. 103-04. UTSW's footnote, far from "including a detailed presentation on the conflicting state of the law," as UTSW describes it, Pet. 25, included irrelevant caselaw and omitted *Smith v. Xerox*, controlling authority decided more than one month earlier. Pet. App. 104 n.8. The failure to submit a written alternative instruction constitutes forfeiture. *See Kanida*, 363 F.3d at 580 ("Failure to present a specific written instruction to the trial court bars a[] subsequent complaint on appeal that the instruction was not given.").

Moreover, UTSW did not raise an objection during the charge conference. Rather, UTSW asked the district court for an instruction on the same-decision defense under the

mixed-motive framework. *See* JA 262 ("I think we are entitled to an affirmative defense on this retaliation theory."); *id.* at 263 ("I think if an affirmative defense is pled for retaliation, I think we are just entitled to it."). At the end of the conference, when UTSW re-listed all of its objections for the record, UTSW's *only* reference to the mixed-motive charge was this: "We also object to the charge because it lacks the affirmative defense." *Id.* at 271. Throughout the charge conference, UTSW was *requesting* a mixed-motive charge, not objecting to it. And the district court unequivocally set the end of the charge conference as the deadline for entering objections. *Id.* at 273 ("Anything else? I'm telling you now, no new objections."); Pet App. 61 (Elrod, J., concurring in denial of rehearing).[2]

As Judge Boyle, Pet. App. 109-10, and Judge Elrod, *id.* at 61, recognized, UTSW forfeited its objection to the jury instructions. This Court should therefore dismiss the writ as improvidently granted.

II. The 1991 Amendments on Motivating Factor Burden-Shifting Apply to Both Discrimination and Retaliation Claims.

In 1991, Congress amended Title VII to add 42 U.S.C. § 2000e-2(m), providing that

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[2] Because UTSW did not submit a written alternate instruction and did not object before the deadline that coincided with the end of the charge conference, its actions on the morning of May 24, 2010, are irrelevant. But it is worth noting that, despite its weekend research "into some case law," Pet. App. 108, UTSW did not mention *Gross* and did not bring *Smith*, the controlling authority in the Fifth Circuit, to the court's attention. Rather, the district court raised *Smith* on its own. *Id.* at 114 ("I haven't heard anyone cite yet [*Smith*].").

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

The best interpretation of this text is that it applies to Title VII's retaliation provision because retaliation is "an unlawful employment practice," 42 U.S.C. § 2000e-3(a), that can be "established" when the plaintiff proves that retaliation for complaining of discrimination based on "race, color, religion, sex, or national origin" was a "motivating factor for any employment practice," *id.* § 2000e-2(m). UTSW's arguments that § 2000e-2(m) does not apply to retaliation claims are not persuasive.

A. Retaliation Is an "Unlawful Employment Practice" Motivated by "Race, Color, Religion, Sex, or National Origin."

UTSW argues that § 2000e-2(m) includes a list of protected characteristics—race, color, religion, sex, or national origin—that does not include retaliation. But this Court has long made clear that statutes prohibiting discrimination also prohibit retaliation for complaining about that discrimination. *See CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 445 (2008) (holding that 42 U.S.C. § 1981, which provides that all persons "shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens," prohibits retaliation); *Gomez-Perez v. Potter*, 553 U.S. 474, 479-82 (2008) (holding that the federal-sector provision of the ADEA, which prohibits "discrimination based on age," also prohibits

retaliation); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173-74 (2005) (holding that Title IX, which provides that no person "shall, on the basis of sex, . . . be subjected to discrimination under any education program," prohibits retaliation); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969) (holding that 42 U.S.C. § 1982, which provides that all persons "shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property," prohibits retaliation). In short, "[r]etaliation against a person because that person has complained of . . . discrimination is another form of intentional . . . discrimination" based on the characteristics protected by an antidiscrimination statute. *Jackson*, 544 U.S. at 173-74.

Two other provisions of the 1991 Civil Rights Act show that Congress shared this Court's view that retaliation is a form of discrimination based on protected characteristics and so Congress did not intend, by referencing those characteristics specifically, to exclude retaliation. First, § 302 of the 1991 Civil Rights Act barred unlawful discrimination against employees of the Senate, providing that "[a]ll personnel actions affecting employees of the Senate shall be made free from any discrimination based on [] race, color, religion, sex or national origin, within the meaning of section 717 of [Title VII]." 105 Stat. at 1088. Although § 302's list of prohibited bases for personnel actions did not expressly include retaliation, it was well accepted at the time that § 717 (Title VII's federal-section provision) prohibited retaliation. *See, e.g.*, *Gulley v. Orr*, 905 F.2d 1383, 1384 (10th Cir. 1990); *Hampton v. IRS.*, 913 F.2d 180, 182 (5th Cir. 1990); *Barnes v. Small*, 840 F.2d 972, 974 (D.C. Cir. 1988); *Jordan v. Clark*, 847 F.2d 1368, 1371 (9th Cir. 1988); *Harris v. Brock*, 835 F.2d 1190, 1191

(7th Cir. 1987). Thus, the list of protected characteristics—to be applied "within the meaning of section 717"—protected against retaliation, without explicitly specifying so.

Second, § 101 of the 1991 Civil Rights Act overruled *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), by amending 42 U.S.C. § 1981 to clarify that the right to "make and enforce contracts" extends to the period after the contractual relation is established. 105 Stat. at 1071-72. The House Report explained that the purpose of this provision was "to bar all racial discrimination in contracts . . . includ[ing] . . . retaliation." H.R. Rep. No. 102-40 (II), at 37 (1991), *reprinted in* 1991 U.S.C.C.A.N 694, 730-31. In discussing retaliation in reference to § 101 (that applies only to 42 U.S.C. § 1981, which does not expressly include retaliation, *see CBOCS*, 553 U.S. at 445), the legislative history confirms that Congress did not see discrimination and retaliation as distinct. The list of protected characteristics in § 2000e-2(m) does not, therefore, demonstrate that Congress meant to take retaliation outside the scope of conduct covered by the section.[3]

UTSW's argument that the 1991 amendments' mixed-motive provision does not apply to retaliation turns largely on the fact that § 2000e-2(m) is located in a section of Title VII titled "Unlawful Employment Practices," 42 U.S.C. § 2000e-2, which contains the prohibition on

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[3] It is true that another provision of Title VII, 42 U.S. C. § 2000e-5(g)(2)(A), includes retaliation in a list of forbidden reasons for an employment action. But that provision was not enacted as part of the 1991 Civil Rights Act. *See Gomez-Perez*, 553 U.S. at 486 (refusing to draw a negative implication where two provision were not enacted at the same time).

discrimination because of protected characteristics, and not in the section titled "Other Unlawful Employment Practices," 42 U.S.C. § 2000e-3, which contains the prohibition on discrimination because of protected activities. UTSW's argument relies too heavily on the placement of § 2000e-2(m) and fails to explain why Congress would have different standards of causation for discrimination and retaliation claims under Title VII, when Congress recognized retaliation as a form of discrimination and especially given that Title VII plaintiffs often allege both types of unlawful employment practice in the same case. *Cf. Burlington N. & Santa Fe. Ry. Co. v. White*, 548 U.S. 53, 74-75 (2006) (Alito, J., concurring) (suggesting that discrimination and retaliation provisions, which are "complementary and closely related," should be read together).

UTSW argues that the burden-shifting regime of § 2000e-2(m) creates confusion when a plaintiff alleges discrimination under Title VII and under a statute that employs a different causation standard, such as the ADEA. Pet. Br. 29 n.1. In fact, however, such confusion will more frequently arise if different causation standards apply to Title VII discrimination and retaliation claims. Thus, the confusion that UTSW identifies provides an additional indication that Congress intended the 1991 motivating-factor amendments to apply to both discrimination and retaliation claims.

B. Interpreting § 2000e-2(m) to Apply to Retaliation Accords with the EEOC's Longstanding Position.

Shortly after the 1991 amendments became law, the EEOC amended its Compliance Manual to interpret

§ 2000e-2(m) to apply to both discrimination and retaliation claims. *See* Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory, EEOC Directives Transmittal No. 915.022 (July 14, 1992), *available at* http://www.eeoc.gov/policy/docs/disparat.html. The EEOC explained that it "has a unique interest in protecting the integrity of its investigative process, and if retaliation were to go unremedied, it would have a chilling effect upon the willingness of individuals to speak out against employment discrimination." *Id.* n.14; *see also* EEOC Compliance Manual 8-16 & n.45, *available at* http://www.eeoc.gov/policy/docs/retal.html (stating that to interpret otherwise "undermines the purpose of the anti-retaliation provisions of maintaining unfettered access to the statutory remedial mechanism").

The EEOC's views are entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1940). *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110 n.6 (2002) (citing *Christiansen v. Harris County*, 529 U.S. 576, 587 (2000)); *but see EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 259-60 (1991) (Scalia, J., concurring in the judgment) (arguing that EEOC interpretations are entitled to *Chevron* deference). Deference is particularly appropriate where, as here, the interpretation was "contemporaneous with [the statute's] enactment [and] consistent since the statute came into law," *Arabian Am. Oil Co.*, 499 U.S. at 257, and the interpretation is the result of a centralized, formal process and designed to apply to all cases, *cf. United States v. Mead Corp.*, 533 U.S. 218, 233-34 (2001).

III. If the 1991 Motivating-Factor Amendments to Title VII Do Not Apply to Retaliation Claims, *Price Waterhouse* Burden-Shifting Governs Those Claims.

If the 1991 amendments do not apply to Title VII retaliation claims, *Price Waterhouse* continues to control the order of proof in such cases. Under *Price Waterhouse*, once the plaintiff shows that the defendant acted at least in part to retaliate, the burden of proof shifts to the defendant to attempt to prove, as an affirmative defense, that it would have made the same decision absent the retaliatory motive. If the defendant fails to make that showing, it is presumed that retaliation was the but-for cause of the challenged action. If the defendant proves the same-decision defense, the employer has not violated Title VII and has no liability.

A. UTSW Ignores the Continuing Vitality of *Price Waterhouse* Burden-Shifting for Title VII Retaliation Claims.

UTSW argues that the 1991 amendments left Title VII's retaliation provision "unchanged." Pet. Br. 6. If UTSW is correct, the burden-shifting framework of *Price Waterhouse* continues to control Title VII retaliation claims.

UTSW begins by arguing that the words "because of" in § 2000e-3(a) show that the plaintiff bears the burden of proof at all times. But UTSW's conclusion contradicts the decision in *Price Waterhouse*, in which this Court held that, notwithstanding the similar use of "because of" in Title VII, the burden of proof shifts to the defendant to prove, as an affirmative defense, that it would have made

the same decision even without the unlawful motive. The same reading applies here. *See FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1185 (2011) ("[I]dentical words and phrases within the same statute should normally be given the same meaning . . . ." (quoting *Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224, 232 (2007))).

The substantive provision at issue in *Price Waterhouse* was 42 U.S.C. § 2000e-2(a), which, like § 2000e-3(a), outlaws discrimination "because of" prohibited factors. In the brief time between *Price Waterhouse* and the 1991 amendments, courts routinely applied the burden-shifting framework to retaliation claims. *See Johnson v. Sullivan*, 945 F.2d 976, 980 n.6 (7th Cir. 1991); *Vislisel v. Turnage*, 930 F.2d 9, 9 (8th Cir. 1991); *Canitia v. Yellow Freight Sys., Inc.*, 903 F.2d 1064, 1068 (6th Cir. 1990) (Nelson, J., concurring); *Carter v. S. Cent. Bell*, 912 F.2d 832, 843 (5th Cir. 1990), *abrogated on other grounds*, *Foley v. Univ. of Houston Sys.*, 355 F.3d 333, 339 (5th Cir. 2003); *Williams v. Mallinckrodt, Inc.*, 892 F.2d 75, 75 (4th Cir. 1989).[4]

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[4] *See also Barnes v. City of New Orleans*, 1991 WL 220380, at *6 (E.D. La. 1991); *Garvey v. Dickinson Coll.*, 775 F. Supp. 788, 796 n.4 (M.D. Pa. 1991); *Jones v. City of Elizabeth City*, 840 F. Supp. 398, 403 (E.D.N.C. 1991), *aff'd*, 2 F.3d 1149 (4th Cir. 1993); *Milligan-Jensen v. Mich. Technological Univ.*, 767 F. Supp. 1403, 1411 n.2 (W.D. Mich. 1991), *rev'd on other grounds*, 975 F.2d 302 (6th Cir. 1992); *Purrington v. Univ. of Utah*, 1993 WL 259457, at *8-*9 (D. Utah 1991), *aff'd*, 996 F.2d 1025 (10th Cir. 1993); *Daines v. City of Mankato*, 754 F. Supp. 681, 699 (D. Minn. 1990); *Ellerby v. Ill., Circuit Court Fifteenth Judicial Circuit*, 1990 WL 41122, at *3 (N.D. Ill. 1990); *Jordan v. Wilson*, 755 F. Supp. 993, 998 n.5 (M.D. Ala. 1990); *Melius v. Waukegan Pub. Sch. Dist. No. 60*, 1990 WL 36822, at *8 (N.D. Ill. 1990); *Dunning v. Nat'l Indus., Inc.*, 720 F. Supp. 924, 929 n.6 (M.D.

(continued...)

After the 1991 amendments, most courts continued to apply *Price Waterhouse* to such claims. *See, e.g.*, *Pennington v. City of Huntsville*, 261 F.3d 1262, 1269 (11th Cir. 2001); *Speedy v. Rexnord Corp.*, 243 F.3d 397, 401-02 (7th Cir. 2001); *Matima v. Cellie*, 228 F.3d 68, 81 (2d Cir. 2000); *Norbeck v. Basin Elec. Power Coop.*, 215 F.3d 848, 852 (8th Cir. 2000); *Kubicko v. Ogden Logistics Servs.*, 181 F.3d 544, 552 n.7 (4th Cir. 1999); *Tanca v. Nordberg*, 98 F.3d 680, 682-85 (1st Cir. 1996). Because burden-shifting has been a part of Title VII mixed-motive retaliation cases for more than two decades, considerations of stability, predictability, and respect for longstanding consensus among the courts counsel strongly against the Court now reinterpreting the requirements of Title VII. In retaliation cases, "[c]ountless judges have instructed countless juries in language drawn from" *Price Waterhouse*. *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2641 (2011).

UTSW argues that if Congress wanted to shift the burden of persuasion to defendants to negate but-for causation through a same-decision defense in Title VII retaliation cases, Congress would have done so expressly when it amended Title VII in 1991. Pet. Br. 16. But to the extent that UTSW is correct that Congress tailored the 1991 changes to cover discrimination but not retaliation, Congress had no reason to amend the retaliation provision to provide for *Price Waterhouse* burden-shifting because *Price Waterhouse* was already the law. That is, if the 1991

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[4](...continued)
Ala. 1989); *Globus v. Skinner*, 721 F. Supp. 329, 335 (D.D.C. 1989), *aff'd*, 1990 WL 123927 (D.C. Cir. 1990); *United States v. City of Montgomery*, 744 F. Supp. 1074, 1079 (M.D. Ala. 1989), *aff'd*, 911 F.2d 741 (11th Cir. 1990).

amendments that altered the result in *Price Waterhouse* for some claims do not apply to retaliation claims, *Price Waterhouse* continues to govern litigation of retaliation claims.

UTSW's argument would require this Court to conclude that the 1991 amendments *sub silentio* overruled *Price Waterhouse*'s application to § 2000e-3(a), although the amendments were, in UTSW's view, otherwise inapplicable to retaliation claims. But the best interpretation of the congressional silence as to retaliation claims posited by UTSW is that, except insofar as Congress altered *Price Waterhouse*'s application to the claims § 2000e-2(m) covers, it left the law undisturbed. *See Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-40 (2009) (stating that the Court does not conclude that Congress intended to abrogate a prior interpretation absent a "clear expression"). Not only is it "always appropriate to assume that our elected representatives . . . know the law," *Cannon v. Univ. of Chi.*, 441 U.S. 677, 696-98 (1979), it is especially clear that Congress was legislating with knowledge of *Price Waterhouse* because the 1991 Civil Right Act was "in large part" a response to that and other decisions. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 (2003) (citation omitted). Thus, it is "not only appropriate but also realistic to presume that Congress was thoroughly familiar with" *Price Waterhouse*'s application to Title VII retaliation and that, to the extent that Congress did not change the law with respect to retaliation, it expected that application to remain undisturbed. *See Cannon*, 441 U.S. at 699; *see also id.* at 702-03 (noting that "the very persistence" of an assumption provides "further evidence that Congress at least acquiesces in, and apparently affirms, that assumption").

UTSW attempts to avoid this result by asserting that if *Price Waterhouse* burden-shifting remains viable for mixed-motive retaliation claims, then "§ 2000e-2(m)'s specific motivating-factor provision would be surplusage, and its exclusion of retaliation would be inexplicable." Pet. Br. 18-19. But under *Price Waterhouse*, a plaintiff who shows that an unlawful practice was a motivating factor for an employer's action does not establish a violation of Title VII, but shifts the burden to the defendant to disprove but-for causation by showing that it would have made the same decision even absent the unlawful motive. The 1991 amendments, in contrast, provide that a plaintiff establishes a violation by showing that discrimination was a motivating factor for the defendant's action, but enable the defendant to limit relief by offering proof that it would have made the same decision in the absence of the improper motive. The two schemes are distinct, and the continuing viability of *Price Waterhouse* for retaliation claims would not render the 1991 amendments surplusage.

B. *Gross* Did Not Overrule *Price Waterhouse* Burden-Shifting in Title VII Retaliation Cases.

UTSW argues that the plaintiff should at all times bear the burden of proof in Title VII retaliation cases because, in *Gross*, the Court rejected the application of *Price Waterhouse* burden-shifting to cases brought under the ADEA.[5] *Gross* does not control this Title VII case, as *Gross* explicitly rejected the argument that decisions under

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[5] UTSW relies on *Gross* to support its argument that the phrase "because of" means "but-for." But under *Price Waterhouse*, the issue is not whether but-for causation is required, but who bears the risk of non-persuasion on the issue.

one antidiscrimination statute on matters such as *Price Waterhouse* burden-shifting are controlling under other statutes. *Gross* rules out UTSW's argument that this Court's decisions (including *Gross* itself) can be transported wholesale from statute to statute.

In *Gross*, the Court acknowledged that *Price Waterhouse* had established burden-shifting for mixed-motive cases under Title VII, 557 U.S. at 171, but held that the burden of showing the absence of causation does not shift to the defendant in cases brought under the ADEA, *id.* at 173. Just as the Court ruled that its construction of Title VII in *Price Waterhouse* does not control in the ADEA context, the Court's construction of the ADEA in *Gross* does not control in this case. *Gross* rested on the principle that courts "'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.'" 557 U.S. at 174 (quoting *Fed. Express*, 552 U.S. at 393). Absent this principle, *Gross* would have had to either overrule *Price Waterhouse* or follow it, neither of which it did. Nothing in *Gross* suggests that *Price Waterhouse* is not entitled to *stare decisis*. *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) (stating that *stare decisis* has "special force" in statutory construction, "for Congress remains free to alter" the statute (citation omitted)).

In fact, ADEA claims and Title VII retaliation claims are substantively different. The ADEA provides that "[i]t shall not be unlawful for an employer . . . to take any action otherwise prohibited [by the anti-discrimination provisions of the ADEA] where . . . the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f). This provision makes clear that an adverse action that is in part

the result of a discriminatory motive is "nevertheless lawful so long as it is 'based on' a reasonable factor other than age." *Smith v. City of Jackson*, 544 U.S. 228, 253 (2005) (O'Connor, J., concurring in the judgment). Title VII contains no similar provision, in either its discrimination or retaliation sections. Because the ADEA's text addresses mixed-motive cases in a way different from Title VII, *Price Waterhouse* does not apply in ADEA cases.

More generally, the Court has recognized that the ADEA was written with the view that "age discrimination was a serious problem, but one different in kind from discrimination on account of race." *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 587 (2004). As a result, the "Court's approach to interpreting the ADEA in light of Title VII has not been uniform." *Gross*, 557 U.S. at 175 n.2. As this Court has observed, there are "legitimate reasons as well as invidious ones for making employment decisions based on age." *Cline*, 540 U.S. at 587. And where an employer takes an action because of a factor strongly and obviously correlated with age, such as pension status, *see Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), or physical ability, plaintiffs may find it too easy to show that age was one "motivating factor" for the decision, because the actual decision maker probably at least noted—and so, in a sense, considered—the plaintiff's age.

In short, given the substantive differences between ADEA claims and Title VII claims, mixed-motive burden-shifting that is inappropriate in ADEA cases may nevertheless be appropriate in the Title VII context. *Gross* thus does not dictate the result here.

C. *Price Waterhouse* Burden-Shifting Is Consistent with This Court's Precedents.

Under the *Price Waterhouse* framework, even where a plaintiff shows that an unlawful consideration played a motivating part in the defendant's decision, the defendant can avoid liability by proving, as an affirmative defense, that it would have made the same decision absent the unlawful motive. 490 U.S. at 244-45. As the plurality in *Price Waterhouse* observed, the burden-shifting framework is consistent with this Court's decisions in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977), and *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 402 (1983), and strikes a reasonable balance between employee rights and employer prerogatives where retaliation is one of multiple causes for a defendant's action.

In *Mt. Healthy*, the plaintiff alleged that he had not been rehired in retaliation for exercising his First Amendment rights. The Court held that the plaintiff carried the initial burden "to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor' or to put it in other words, that it was a 'motivating factor' in the [defendant's] decision not to rehire him." 429 U.S. at 287. Once the plaintiff carried that burden, the defendant could avoid liability by proving that "it would have reached the same decision as to [plaintiff's] reemployment even in the absence of the protected conduct." *Id.* The Court explained that the availability of the same-decision affirmative defense would avoid the possibility of placing the plaintiff "in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." *Id.* at

285. Otherwise, a plaintiff might be reinstated "in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision even if the same decision would have been reached had the incident not occurred." *Id.*

Similarly, in *Transportation Management*, the Court upheld an NLRB decision holding that an unfair labor practice is established if "the employee's protected conduct was a substantial or motivating factor in the adverse action," but permitting an employer to avoid liability by showing, as an affirmative defense, that it would have taken the same action "regardless of [its] forbidden motivation." 462 U.S. at 401. The Court found that shifting to the employer the burden of establishing the same-decision affirmative defense was reasonable, explaining:

> The employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.

Id. at 403.

UTSW's argument that burden-shifting invites abuse by employees and is unfair to employers runs counter to this Court's decisions in both *Mt. Healthy* and *Transportation Management*, as well as *Price Waterhouse*. First, under the *Price Waterhouse* framework, an employee cannot use opposition to an unlawful employment practice as a shield to avoid an

adverse employment action that is justified by lawful considerations, because an employer's same-decision defense is a complete defense to liability. As this Court explained in *Mt. Healthy*, the affirmative defense is designed to prevent an employee who engages in protected activity from being put in a better position than if he had done nothing.

Second, UTSW's claim that it is unfair for an employer to bear the burden of proof on the same-decision defense ignores the fact that the burden shifts to the employer only after the plaintiff has shown that an unlawful practice tainted the decision-making process. *See Transp. Mgmt.*, 462 U.S. at 403. Where a plaintiff lacks evidence that retaliation played a part in the defendant's decision, the case will not survive summary judgment. And where an employer proves that it would have taken the same employment action without a retaliatory motive, the plaintiff is not entitled to any relief, although the employer's motivation was, in part, unlawful.

Finally, the Court should reject UTSW's assertion that opposing unlawful practices is a choice and thus is less deserving of protection. Pet. Br. 33 ("While an employee's membership in a protected class is generally outside of his or her control, the decision to engage in protected activity is not."). UTSW's position is contrary to this Court's decisions recognizing that enforcement of the civil rights statutes depends on protecting those who report discrimination from retaliation. *See, e.g., Burlington N.*, 548 U.S. at 67 (explaining the different purposes of Title VII's antidiscrimination and antiretaliation provisions and stating that Title VII provides broader protection for victims of retaliation than victims of discrimination because

"Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses"); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) ("[A] primary purpose of antiretaliation provisions" is to "[m]aintain[] unfettered access to statutory remedial mechanisms.").

D. *Price Waterhouse* Burden-Shifting Is Distinct from *McDonnell Douglas* Burden-Shifting.

In arguing against *Price Waterhouse* burden-shifting, UTSW cites decisions of this Court explaining, in a different Title VII context, that Title VII plaintiffs at all times bear the ultimate burden of persuasion. Pet. Br. 16 (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 258 (1981); *Patterson*, 491 U.S. 187). The cases cited by UTSW refer to the burden-shifting framework articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973), and refined in *Burdine*, 450 U.S. at 253, which is distinct from *Price Waterhouse* burden-shifting. Indeed, *Price Waterhouse* repeatedly cites *McDonnell Douglas* and *Burdine* and rejects the notion that the two frameworks are in conflict. *See Price Waterhouse*, 490 U.S. at 245 (plurality); *id.* at 260 (White, J., concurring); *id.* at 261-62 (O'Connor, J., concurring). UTSW's reliance on the *McDonnell Douglas* line of cases is, therefore, misplaced.

Recognizing that direct proof of discriminatory intent is seldom available, *McDonnell Douglas* provides an evidentiary framework at summary judgment to assist the court in determining the existence of an illegal motive. Under the framework, the plaintiff bears the initial burden of establishing a prima facie case of discrimination. Establishment of a prima facie case creates a presumption

of unlawful discrimination, and the burden of production then shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the challenged act. If the defendant fails to carry its burden, the plaintiff is entitled to judgment as a matter of law. If the defendant meets its burden of production, the plaintiff must show that the reasons proffered by the defendant are a pretext for discrimination. The burden of persuasion remains at all times with the plaintiff. The *McDonnell Douglas* framework "is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978). And it is generally recognized that the shifting burdens established in *McDonnell Douglas* are not an appropriate jury instruction. *See U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983).

In contrast, under the *Price Waterhouse* framework, once a plaintiff carries his burden of showing that an unlawful employment practice was a motivating factor for the defendant's adverse action, the burden shifts to the defendant to attempt to prove, as an affirmative defense, that it would have taken the same action even without the unlawful motive.

Thus, while *McDonnell Douglas* shifts the burden of production to the defendant on the issue of intent once the plaintiff establishes a prima facie case, while leaving the ultimate burden of persuasion on that issue on the plaintiff, *Price Waterhouse* shifts the burden of persuasion to the defendant on the issue of causation once an unlawful motive has been proved. UTSW fails to apprehend the distinction between the two frameworks, and its argument

based on the *McDonnell Douglas* line of cases is inapposite.

IV. Even If the Burden of Proving But-For Causation Remains at All Times with the Plaintiff, UTSW Is Not Entitled to Judgment.

UTSW, having failed to persuade the jury, the district court, and the court of appeals that it would have taken the same action against Dr. Nassar regardless of any retaliatory motive, now seeks to relitigate that factual dispute before this Court. Thus, UTSW asks the Court to grant it judgment as a matter of law, arguing that no properly instructed jury could find for Dr. Nassar. Pet. Br. 35-38. Even if this aspect of the case had been properly presented to the Court and even if such fact-based decision making were appropriate here, the Court must reject UTSW's request.[6]

UTSW's claim that Dr. Nassar cannot prove that retaliation was the but-for cause of UTSW's decision to block Dr. Nassar's employment with Parkland depends on UTSW's theory that the decision was made before Dr. Nassar complained of discrimination. But the jury rejected UTSW's theory and, as both lower courts concluded, the record contains ample evidence to create a triable issue on the point. *See* Pet. App. 10-12 (court of appeals); JA 261-62 (district court).

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[6] The question presented in the petition for certiorari did not include whether the jury's finding on retaliation was supported by sufficient evidence nor whether placing the burden of proof on Dr. Nassar to prove but-for causation would have required judgment as a matter of law for UTSW.

For example, at trial UTSW could not explain why, if Fitz resolved the issue in April, Parkland continued to believe that Dr. Nassar could still become a Parkland employee. *See* Pet. App. 5; JA 56-65, 69-71, 214-16. Indeed, Parkland made a verbal offer of employment, negotiated a salary, and prepared a formal offer letter, all after the matter was, according to UTSW's brief (at 8), "settled." Pet. App. 5; JA 215-16, 236, 245-50, 314-15, 325. Further, throughout the process, Parkland's staff exchanged internal communications and administrative forms detailing its progress toward hiring Dr. Nassar. JA 67-71, 326-30. UTSW also could not explain why Ross, the person to whom Fitz allegedly communicated his objection in April 2006, met with Fitz after Dr. Nassar's resignation to discuss the allegations of discrimination, after which Ross told Dr. Nassar not to commit to another job "just yet" because "many conversations are going on to try to resolve this issue." JA 387.

Most importantly, Fitz admitted to Keiser that his purpose was retaliatory, evidence corroborated by Parkland's EEOC submission. Pet. App. 5, 11; JA 39-45, 322-23. And Fitz's own testimony was not credible. Fitz at first denied and later grudgingly agreed that his conversations with Ross extended beyond April until after Dr. Nassar submitted his resignation letter. JA 96-99, 133-34. And he implausibly testified that he had no knowledge of Levine's behavior until he read Dr. Nassar's resignation letter, *id.* at 122-24, 129, although Dr. Nassar had complained several times before, Pet. App. 4; JA 191-92, 206-10. And in his affidavit to the EEOC, where Fitz identified the portions of the 1979 agreement on which he purportedly relied in April, he included a portion that was not negotiated until June 2006 and only took effect in

September 2006. JA 111-13; *see id.* 359-83. Moreover, it was simply unbelievable that Fitz, without apparent reflection, believed that the agreement required Parkland to lose a physician who was extraordinarily difficult to replace, threatening Parkland's mission. Patient safety was endangered because Dr. Nassar's position was left unfilled for six months and then filled by a doctor who needed five or six additional months of training before she could assume Dr. Nassar's duties. *Id.* 65-66; R. 2459-64. UTSW could not explain why that replacement doctor was employed directly by Parkland and not by UTSW. JA 232-41, 250-51.

In sum, the evidence shows that the decision not to allow Dr. Nassar to work directly for Parkland was not final until after his resignation. Thus, even if UTSW were correct that the burden of proof should remain at all times with Dr. Nassar, a jury so instructed could find for Dr. Nassar on his claim of retaliation. Therefore, if the Court holds that the burden of proof should not have shifted to UTSW to disprove but-for causation, this case should be remanded for a new trial under the new standard.

CONCLUSION

The decision of the Fifth Circuit should be affirmed.

Respectfully submitted,

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REPLY BRIEF

No. 12-484

In the
Supreme Court of the United States

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER,

PETITIONER,

v.

NAIEL NASSAR, M.D.,

RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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INTRODUCTION

Respondent Naiel Nassar and the United States do not dispute that Title VII's retaliation provision is identical to the age-discrimination provision this Court construed in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009). Under *Gross*, therefore, Nassar must prove that retaliation was the but-for cause of the challenged employment action. Nassar and the United States attempt to sidestep *Gross* by arguing that the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, specifically authorized mixed-motive Title VII retaliation claims. That contention is so weak that Nassar did not even raise it in his brief in opposition. Numerous courts of appeals have repeatedly and uniformly rejected it. And neither Nassar nor the United States is able to cite a single decision of any court accepting their position.

The reason is straightforward: The 1991 amendments authorize mixed-motive treatment for claims alleging discrimination on the basis of "race, color, religion, sex, or national origin"—not claims alleging retaliation, which Congress specifically addressed in a different Title VII provision. 42 U.S.C. § 2000e-2(m).

Nassar and the United States seek to override Title VII's plain text and structure by relying on a line of decisions holding that, when Congress has *not* specifically addressed retaliation, a broad, "general" prohibition on class-based discrimination can be construed to encompass retaliation. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). But as this Court has already determined, Title VII's

specificity makes it "vastly different" from such general provisions. *Id.* Construing "race, color, religion, sex, or national origin" to include retaliation in Title VII would render Title VII's separate retaliation provision, and portions of other statutory provisions that rely on it, surplusage. As *Gross* held and *Jackson* further acknowledged, Congress's tailoring must be given effect.

Nassar falls back to the position that the 1991 amend ents did not need to authorize mixed-motive retaliation claims because *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), had already done so. That argument runs headlong into *Gross*. *Price Waterhouse* construed Title VII's prohibition against discrimination on the basis of race, color, religion, sex, or national origin—not its separate retaliation provision. After the 1991 mixed-motive amendments abrogated *Price Waterhouse*, *Gross* held that those amendments gave rise to the "strongest possible" inference that mixed-motive claims are permissible only to the extent that Congress has specifically authorized them. 557 U.S. at 175.

Under *Gross*, the plain language of the 1991 amendments is dispositive. Because those amendments do not authorize mixed-motive retaliation claims, Title VII's retaliation provision is indistinguishable from the identical provision this Court construed in *Gross*. Nassar's effort to revive *Price Waterhouse*, an effort the United States does *not* join, serves only to underscore the irreconcilability of his position with *Gross*.

ARGUMENT

I. *GROSS* CONTROLS THIS CASE.

For the reasons explained in the Medical School's opening brief, *Gross* is indistinguishable. Pet. Br. 21–24. Title VII's retaliation provision, 42 U.S.C. § 2000e-3(a), and the Age Discrimination in Employment Act ("ADEA") provision construed in *Gross*, 29 U.S.C. § 623(a)(1), are identical. Indeed, Congress deliberately modeled one on the other. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 & n.16 (1985). Thus, they have the same meaning—a conclusion that is so undeniable that even some of Nassar's *amici* acknowledges the point. *See* Washington Lawyers Committee, *et al.* Br. 2 (urging the Court to overrule *Gross*).

Unlike those *amici*, Nassar has never argued that *Gross* was wrongly decided. The question before this Court, therefore, is whether to distinguish *Gross*, and open the door to interpretive chaos, by construing identical provisions differently. *Cf. S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 171 (1999). Nassar attempts to evade the obvious answer to that question by grasping at two straws: the 1991 amendments and *Price Waterhouse*.[1]

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[1] Nassar's request that the Court dismiss the writ as improvidently granted rehashes the same meritless forfeiture arguments that formed the centerpiece of his brief in opposition. *See* Resp. Br. 14–15; Br. in Opp. 8–11. By granting the writ, the Court effectively rejected those arguments. *See Stevens v. Dep't of Treasury*, 500 U.S. 1, 8 (1991). There were multiple reasons for this Court to do so, the simplest being that the court of appeals unquestionably passed upon the issue, which is all this Court's pressed-*or*-passed upon standard requires. *See United*

A. The 1991 Amendments To Title VII Authorize Mixed-Motive Claims Only For Class-Based Discrimination, Not For Retaliation.

Under the 1991 amendments, "an unlawful employment practice is established when the complaining party demonstrates that *race, color, religion, sex, or national origin* was a motivating factor for any employment practice . . . ." 42 U.S.C. § 2000e-2(m) (emphasis added). By authorizing mixed-motive treatment for class-based discrimination claims, that provision serves only to underscore the absence of any authorization for retaliation claims. *See Dean v. United States*, 556 U.S. 568, 573 (2009).

1. Title VII Clearly Distinguishes Between Retaliation And Class-Based Discrimination.

Title VII divides discrimination claims into two different categories addressed in two different sections: (1) discrimination "because of [an] individual's *race, color, religion, sex, or national origin*," *i.e.*, discrimination based on membership in a protected class, 42 U.S.C. § 2000e-2(a) (emphasis added); and (2) discrimination "because [an individual] *has opposed any practice made an unlawful employment practice . . . or because he has . . . participated in any manner in an*[y] *investigation, proceeding, or hearing*" under Title VII,

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States v. Williams, 504 U.S. 36, 41 (1992); Pet. 23–25; Pet. Reply 1–4.

i.e., discrimination based on protected conduct, *id.* § 2000e-3(a) (emphasis added).

Title VII thereby identifies seven different prohibited bases for discrimination, each of which is an "unlawful employment practice"—five based on membership in a protected class, and two based on protected conduct. The mixed-motive amendment "conspicuously tracks" the five categories of class-based discrimination listed in § 2000e-2(a), "while making no mention of" the two other prohibited bases described in Title VII's retaliation provision, § 2000e-3(a). *Carter v. Luminant Power Servs. Co.*, No. 12-10642, --- F.3d ---, 2013 WL 1337365, at *1 (5th Cir. Apr. 3, 2013). That "is of great import," *id.*, because "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted).

Nassar's contrary contention—that discrimination on the basis of "race, color, religion, sex, or national origin" includes retaliation—would render Title VII's retaliation provision, § 2000e-3(a), superfluous. If Title VII's prohibition against discrimination on the basis of race, color, religion, sex, or national origin included retaliation, then its class-based discrimination provision, § 2000e-2(a), would cover retaliation, and Title VII's separate retaliation provision would be unnecessary. Similarly, if the 1991 amendment's prohibition on "employment practice[s] . . . motivated in part by 'race, color, religion, sex, or national origin'"

encompassed a "Title VII retaliation claim," U.S. Br. 12, the amendment would make § 2000e-3(a) superfluous a second time over.

Although the United States attempts to elide that point, it acknowledges that its position would render other provisions of Title VII superfluous and unnecessary. U.S. Br. 20. For example, Title VII limits the available remedies in certain circumstances where a defendant acted "for any reason other than discrimination on account of race, color, religion, sex, or national origin *or in violation of section 2000e-3(a) of this title*." 42 U.S.C. § 2000e-5(g)(2)(A) (emphasis added). As the United States acknowledges, the italicized portion is superfluous under its view. U.S. Br. 20. The same would be true of similar language in Title VII's extraterritoriality provisions. 42 U.S.C. § 2000e-1(b) ("It shall not be unlawful under section 2000e-2 *or* 2000e-3 . . . ." (emphasis added)); *id.* § 2000e-1(c)(1) (referring to a "practice prohibited by section 2000e-2 *or* 2000e-3" (emphasis added)). The general civil rights damages statute likewise refers separately to violations of § 2000e-3 and § 2000e-2. 42 U.S.C. § 1981a(a)(1).

Of course, courts should construe statutory text to be surplusage only in those rare instances where a statute cannot reasonably be read to give effect to all of its provisions. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Here, a very reasonable construction effectuates all of Title VII's provisions—that Congress meant what it said in distinguishing between the two categories of discrimination.

The statute's structure confirms that plain meaning. Congress enacted the mixed-motive

provision as an amendment to § 2000e-2, which generally prohibits discrimination on the basis of membership in a protected class. Congress did *not* make a similar amendment to § 2000e-3, Title VII's retaliation provision. Nassar and the United States respond that this structural argument cannot overcome more direct interpretive evidence. *See* Resp. Br. 19; U.S. Br. 17. But as explained above, the plain statutory text refutes their position even before one considers the broader statutory structure.

Moreover, the statutory structure is informative. The United States argues that two subsections in § 2000e-2 plainly apply to retaliation claims. U.S. Br. 17–18. But the reason is that those provisions say so. Unlike subsection (m) and numerous other subsections in § 2000e-2, those provisions are not expressly limited to discrimination based on race, color, religion, sex or national origin. To the contrary, § 2000e-2(n)—which Congress enacted at the same time as § 2000e-2(m) and placed directly after it—precludes collateral challenges to a judgment resolving "a claim of employment discrimination under the Constitution or Federal civil rights laws." 42 U.S.C § 2000e-2(n)(1)(A). Similarly, § 2000e-2(g) sets forth a broad national-security exemption to *any* otherwise "unlawful employment practice," without limitation.

Those provisions show that, when Congress has wanted a provision to govern all types of discrimination under Title VII, it has said so, in both the original Act and the 1991 amendments. In contrast, when Congress has wished to limit a

provision to either class-based discrimination or retaliation, it has done that.

Here, Congress chose to limit the mixed-motive provision, along with most of § 2000e-2, to class-based discrimination (*i.e.*, five of the seven prohibited bases for discrimination in Title VII). Thus, the United States' litany of things that Congress could have done, but did not do, is odd at best. U.S. Br. 14–15. Title VII contains provisions referring to all employment discrimination, to all unlawful employment practices, and to two different subsets thereof (class-based discrimination and retaliation). In the mixed-motive amendments, Congress chose to use the only one of those models that does not encompass retaliation.

So Nassar and the United States turn to the legislative history. Even if legislative history supported their position, it could not overcome the plain statutory text and structure. Pet. Br. 20–21. And it does not support their position. Nassar and the United States cite only general, aspirational statements, none of which address the specific question presented here. *See* Resp. Br. 18; U.S. Br. 24–26. As one court observed, "[t]he legislative history is at best unclear as to whether Congress intended that retaliation claims would be governed by [§ 2000e-2(m)]" and "fails even to mention [Title VII] retaliation claims specifically." *Woodson v. Scott Paper Co.*, 109 F.3d 913, 934 (3d Cir. 1997).

The one thing the legislative history makes clear is that Congress was aware of retaliation. As Nassar highlights, the 1991 amendments amend 42 U.S.C. § 1981 to bring retaliation claims within its scope.

See Resp. Br. 18 (discussing H.R. Rep. No. 102-40 (II), at 37 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 730–31). Congress also cross-referenced § 2000e-3 in § 1981a, which concerns the amount of recoverable damages for intentional discrimination. *See* 42 U.S.C. § 1981a(a)(1). The Congress that enacted the 1991 amendments thus demonstrated its awareness of Title VII's retaliation provision and referenced it when it wanted to. But Congress elected not to apply its mixed-motive amendments to Title VII retaliation claims.

2. The United States' Atextual Arguments Are Misplaced.

a. The United States relies on a line of cases holding that "a *general prohibition* on racial [or class-based] discrimination" may "cover retaliation against those who advocate the rights of groups protected by that prohibition." *Jackson*, 544 U.S. at 176 (emphasis added); *see also Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *CBOCS W., Inc. v. Humphries*, 553 U.S. 442 (2008); *Gomez-Perez v. Potter*, 553 U.S. 474 (2008). As the United States acknowledges, however, those decisions are "grounded . . . in the text of the relevant statute[s]" they interpreted. U.S. Br. 13. In that same line of decisions, this Court has distinguished Title VII as being "vastly different." *Jackson*, 544 U.S. at 175.

Each decision in that line of cases addressed a statutory scheme that imposed a general ban on discrimination but did not specifically address retaliation. *See Sullivan*, 396 U.S. at 237 (construing 42 U.S.C. § 1982); *Jackson*, 544 U.S. at 173 (construing 20 U.S.C. § 1681(a)); *CBOCS*, 553 U.S. at

446–47 (construing 42 U.S.C. § 1981); *Gomez-Perez*, 553 U.S. at 486–88 (construing 29 U.S.C. § 633a(a)). In contrast to such a "broadly written general prohibition on discrimination," Title VII "spell[s] out in greater detail the conduct that constitutes discrimination in violation of" Title VII by identifying numerous distinct categories of "specific discriminatory practices." *Jackson*, 544 U.S. at 175.

This Court has never read a prohibition on retaliation into a statute that specifically addresses that topic. In *Gomez-Perez*, for example, this Court construed the ADEA's public-sector provisions, which "contains a broad prohibition of 'discrimination,' rather than a list of specific prohibited practices." *Gomez-Perez*, 553 U.S. at 487. (The ADEA's private-sector provisions specifically address retaliation, 29 U.S.C. § 623, but its public-sector provision does not, *id.* § 633a.) Because Congress enacted that "broad, general ban" without specifically addressing retaliation, this Court concluded that Congress did not intend to deny public employees a remedy for retaliation without saying so. *Id.* at 487–88; *see also Jackson*, 544 U.S. at 176 ("[I]n *Sullivan* we interpreted a general prohibition.").

Where Congress has included a separate ban on retaliation, however, it must be given effect. *Carter*, 2013 WL 1337365, at *3. Indeed, the "commonplace of statutory construction that the specific governs the general," *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384–85 (1992), has particular force where, as here, "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *RadLAX Gateway*

Hotel, LLC v. Amalgamated Bank, 132 S. Ct. 2065, 2071 (2012) (citations omitted).

In these circumstances—*i.e.*, "where there is, in the same statute, a particular enactment, and also a general one, which, in its most comprehensive sense, would include what is embraced in the former"—"the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment." *United States v. Chase*, 135 U.S. 255, 260 (1890). Absent "express repeal, or an absolute incompatibility, . . the special is intended to remain in force as an exception to the general." *Washington v. Miller*, 235 U.S. 422, 428 (1914).

In part for that reason, this Court has repeatedly recognized that the same word or phrase can carry a broader or narrower meaning depending on its context. In Title VII, for example, the term "employee" sometimes includes former employees and sometimes does not. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343 (1997). Similarly, the ADEA's prohibition on "age" discrimination refers only to discrimination against older workers, even though other ADEA provisions use the same term, "age," to include younger workers. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 584, 595 (2004); *see also United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001). The presumption that a phrase generally carries the same meaning "is not rigid and *readily yields*" (even within the same statute) when there is a reason to believe, as there is here, that Congress has used the phrase differently in different

contexts. *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932) (emphasis added).

Congress's decision to break out retaliation as a separate category of discrimination in Title VII is not unusual. The ADEA's private-sector provisions do so. *Compare* 29 U.S.C. § 623(a), *with id.* § 623(d). The Americans with Disabilities Act ("ADA"), which Congress enacted nearly contemporaneously with the 1991 amendments, does so. *Compare* 42 U.S.C. § 12112(a), *with id.* § 12203(a). The more recently enacted Genetic Information Nondiscrimination Act of 2008 ("GINA"), does so as well. *Compare* 42 U.S.C. § 2000ff-1(a), *with id.* § 2000ff-6(f). Congress codified retaliation in the ADA's "miscellaneous provisions," 42 U.S.C. ch. 126, subch. IV, and included GINA's retaliation provision in the statute's remedial section, *id.* § 2000ff-6. Congress thus follows two well-established models: sometimes it subsumes retaliation within a general discrimination provision; and sometimes it specifically breaks out retaliation as a different category of discrimination, as it did here.

Congress's tailoring of the various statutes deserves respect. For example, Congress specified as part of the 1991 amendments that plaintiffs may recover compensatory and punitive damages for violations of the ADA's prohibition on discrimination based on discrimination, but *not* for violations of its retaliation provision. 42 U.S.C. § 1981a(a)(2); *see Alvarado v. Cajun Operating Co.*, 588 F.3d 1261, 1264, 1269-70 (9th Cir. 2009); *Kramer v. Banc of Am. Secs., LLC*, 355 F.3d 961, 965 (7th Cir. 2004). A plaintiff cannot evade that limitation on retaliation

damages by arguing that retaliation is a form of age discrimination. *See Alvarado*, 588 F.3d at 1269. For the same reasons, Title VII's prohibition on class-based discrimination cannot be read to encompass retaliation. Text has consequences.

b. In addition to arguing that "race, color, sex, religion, or national origin" includes retaliation in Title VII, the United States appears to argue that § 2000e-2(m) broadly applies to "any employment practice," and retaliation is an employment practice. U.S. Br. 11–12. If that were correct, much of § 2000e-2(m), including its listing of prohibited bases for discrimination, would be surplusage. It is not.

Section 2000e-2(m) does not prohibit mixed-motive employment practices generally; as discussed above, it prohibits an employment practice motivated in part by race, color, religion, sex, or national origin. In context, therefore, an "employment practice" simply refers to an employment decision, such as firing or transferring an employee. If discrimination on a basis enumerated in § 2000e-2(m) motivates or causes "any employment practice," that practice may be unlawful. *See, e.g.*, 42 U.S.C. § 2000e-2(k) (prohibiting an "employment practice" that "causes a disparate impact on the basis of race, color, religion, sex, or national origin"). But that does not change the enumerated bases for prohibited discrimination. Congress prohibited employment practices motivated by discrimination based on the five listed factors, not on others.

3. The EEOC's Informal Guidance Is Not Entitled To Deference.

Nassar suggests that the EEOC's enforcement guidance is entitled to *Skidmore* deference, under which this Court defers to agency views that the Court finds to be persuasive. Resp. Br. 19–20; *see Ky. Ret. Sys. v. EEOC*, 554 U.S. 135, 149–50 (2008); *cf. Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1340 (2011) (Scalia, J., dissenting). Because the agency's guidance is at odds with the plain statutory text, no deference is warranted. *See Ky. Ret. Sys.*, 554 U.S. at 149–50; *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 642–43 n.11 (2007).

Moreover, the EEOC's guidance, which addresses all "claims of retaliation under the statutes enforced by the EEOC," concludes that the 1991 amendments provide a "basis for finding 'cause' whenever there is . direct evidence of a retaliatory motive" under any of those employment discrimination statutes—not only under Title VII. 2 *EEOC Compliance Manual* at 1, § 8-II(E)(1) & n.45 (May 20, 1998), http://www.eeoc.gov/policy/docs/retal.pdf. *Gross* already rejected that broad, atextual "interpretation." Even the United States, which is supporting legislation to overrule *Gross* as applied to all of the major federal employment statutes, does not defend the EEOC's conclusion. *See* Pet. Br. 30. Instead, the United States put together the narrower, though equally incorrect, construction discussed above.

Even apart from its indefensible bottom line, the EEOC's guidance is remarkably unpersuasive. The

EEOC has addressed the question only in footnotes to informal guidance. *See, e.g., Noviello v. City of Boston*, 398 F.3d 76, 90 n.3 (1st Cir. 2005). Neither footnote analyzes the controlling statutory language. The 1992 document—the only contemporaneous guidance—is, as the government hints (at 28, n.11), a mere expression of the EEOC's intent to continue its pre-1991 position for policy reasons even though the 1991 amendments did "not specify retaliation as a basis for finding liability." EEOC, *Enforcement Guidance on Recent Developments in Disparate Treatment Theory*, 1992 WL 1364355, at *6 n.14 (July 14, 1992). The 1998 document essentially states that mixed-motive retaliation claims were viable under Title VII before 1991, and they should stay that way for policy reasons. *See Compliance Manual* § 8-II(E)(1) & n.45.

Put to the choice between the plain statutory text and the EEOC's atextual, wishful thinking, every court of appeals to consider this question has held that the 1991 mixed-motive amendments do not apply to retaliation claims. *See Carter*, 2013 WL 1337365, at *2 n.13; Pet. Br. 18. No one—neither Nassar nor any of his *amici*—has cited a single decision to the contrary. The courts "'must assume that Congress meant what it said'—and heed what it did not." *Id.* at *2 n.13 (quoting *Pinter v. Dahl*, 486 U.S. 622, 653 (1988)). And they have.

B. *Gross* Provides The Interpretive Baseline, Not *Price Waterhouse*.

Although the United States implicitly recognizes that the 1991 amendments are dispositive under *Gross*, Nassar falls back to *Price Waterhouse*. He

argues that, if the 1991 amendments do not authorize Title VII mixed-motive retaliation claims, this Court should do so by reviving the muddled *Price Waterhouse* framework. Resp. Br. 21–27. Nassar's effort to turn back the clock and reopen all of the jurisprudential and practical problems associated with *Price Waterhouse* falters on both *Gross* and the 1991 amendments.

Price Waterhouse certainly has no remaining *stare decisis* effect. *See Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993). As Nassar acknowledges, *Price Waterhouse* construed Title VII's prohibition on discrimination based on race, color, sex, religion, and national origin, 42 U.S.C. § 2000e-2(a), not its separate retaliation provision, *id.* § 2000e-3(a). Resp. Br. 22; *see also* 490 U.S. at 240 (discussing 42 U.S.C. § 2000e-2(a)(1), (2)). *Price Waterhouse* does not even mention Title VII's retaliation provision.

Even as to the provision it did address, *Price Waterhouse* is no longer good law because Congress abrogated it in the 1991 amendments. *See Gross*, 557 U.S. at 179 n.5. *Gross* then held, contrary to *Price Waterhouse*, that other statutory provisions (including identical provisions like the ADEA) presumptively require a plaintiff to prove but-for causation. Pet. Br. 21–23. After *Gross* and the 1991 amendments, there is nothing left of *Price Waterhouse*.

Moreover, the reasons *Gross* gave for rejecting the fractured *Price Waterhouse* opinions are fully applicable here. Pet. Br. 21–24. *First*, the statutory texts of Title VII's retaliation provision and the ADEA are identical, as are the common-law

backdrops against which Congress enacted the statutes. *See Gross*, 557 U.S. at 176–77; *see also Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1363 (2013).

Second, Congress's careful tailoring of the 1991 amendments gives rise to the strongest possible implication that only Title VII class-based discrimination claims are subject to mixed-motive analysis. Pet. Br. 23. Congress's decision to leave Title VII's retaliation provision "unchanged," *id.* at 6, while amending the standard for Title VII class-based discrimination claims, provides valuable contextual evidence for construing the retaliation provision. *See Gross*, 557 U.S. at 175; *Lindh v. Murphy*, 521 U.S. 320, 330 (1997); *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991). Indeed, any other reading would render § 2000e-2(m) surplusage. If Nassar were right that *Price Waterhouse* authorized mixed-motive claims for discrimination and retaliation generally, there would have been no need for Congress to enact § 2000e-2(m). To the extent that Congress sought to alter this Court's treatment of mixed-motive claims, it could have done that by enacting § 2000e-5(g)(2)(B) alone.

Finally, if Nassar had his way, the practical difficulties posed by the *Price Waterhouse* opinions would be worse than ever. *See* Pet. Br. 25–28; *Gross*, 557 U.S. at 178–79; *Price Waterhouse*, 490 U.S. at 279–80 (Kennedy, J., dissenting). Nassar is correct (at 19) that having to apply different standards to different types of employment-discrimination claims is not ideal from an administrability standpoint. Under any reading of the 1991 amendments,

however, that is unavoidable now that Congress has enacted a special regime for some but not all discrimination claims. *See* Pet. Br. 29–30 & n.1. Reviving *Price Waterhouse* would be the worst of all worlds because courts and juries would then have to apply three different standards (*Gross*, the 1991 amendments, and *Price Waterhouse*) to different employment claims.

Nassar responds that "ADEA claims and Title VII retaliation claims are substantially different." Resp. Br. 26. They do not differ in any way that is relevant to the holding or reasoning of *Gross*, as discussed above. Nassar relies on the ADEA's inclusion of an affirmative defense that permits an employer to prove that an "otherwise prohibited" action was "based on" a "reasonable factor[] other than age." 29 U.S.C. § 623(f). That defense, which *Gross* did not even mention, is limited to disparate impact claims. "[I]f an employer in fact acted on a factor other than age, the action would not be [disparate treatment] in the first place." *Smith v. City of Jackson*, 544 U.S. 228, 238 (2005). For that reason as well, it is irrelevant here.

C. There Is No Sound Policy Reason To Limit *Gross* Or Expand The 1991 Amendments.

Congress had good reason to limit mixed-motive treatment to class-based discrimination. Title VII's provisions concerning discrimination based on membership in a protected class, and discrimination due to retaliation, "differ not only in language but [in] purpose as well." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006). Section § 2000e-

2(a) accomplishes Title VII's "primary objective"—"seek[ing] a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status." *Id.* Section 2000e-3(a) is a derivative, prophylactic measure that "seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." *Id.*

If the *amicus* briefs demonstrate anything, it is that there are pros and cons to authorizing mixed-motive claims. And the cons are significant. *See, e.g.*, Pet. Br. 30–35. Congress was entitled to decide that the pros outweigh the cons for core, class-based discrimination claims, but not for retaliation claims.

Mixed-motive retaliation claims do not directly serve the statute's primary objective, and they give rise to additional concerns. Section 2000e-3(a) has a far broader scope than Section 2000e-2(a). Unlike Section 2000e-2(a), Section 2000e-3(a) extends beyond the workplace. *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 67. The class of individuals protected by § 2000e-3(a) is also broader, for the statute covers any person who engages in protected activity, including former employees, *Robinson*, 519 U.S. at 346, and even individuals with a connection to a current or former employee, *see Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 869–70 (2011). Given the breadth of conduct and actors covered by this prophylactic protection, as well as the extent to which it extends beyond the traditional workplace, Congress had excellent reasons not to relieve

plaintiffs of the traditional burden of proving their claims.

Indeed, retaliation claims pose particular danger of abuse. Because of their breadth, any disaffected employee can unilaterally opt-in to such a claim by choosing to engage in protected conduct, no matter how baseless his or her allegations may be. Statistics show that retaliation claims have recently become the single-most litigated type of discrimination claim. *See* Chamber of Commerce Br. 16–17. Yet, "while the number of retaliation charges has skyrocketed, the EEOC has concluded that the large majority of these charges are unfounded." *Id.* at 17. The EEOC found reasonable cause in less than 5% of retaliation charges that proceeded to a reasonable cause determination; the number of actually meritorious claims is, of course, even lower. *Id.*

The costs of defending these mostly meritless claims can be staggering. *See id.* 18–19. And flipping the burden of proof to the defendant would drive up the costs even further. By requiring the defendant to try to prove a negative, a mixed-motive framework precludes summary judgment in most cases and compels many defendants to pay out wasteful settlements to avoid the greater waste of a costly trial followed by an unpredictable jury verdict. *See* Pet. Br. 31–32; Chamber of Commerce Br. 19–20. As the Medical School's opening brief explains and even one of Nassar's *amici* has acknowledged, it is far easier for a plaintiff to prevail on a mixed-motive theory. *See* Pet. Br. 32 (discussing Michael J. Zimmer, *The New Discrimination Law:* Price

Waterhouse *is Dead, whither* McDonnell Douglas?, 53 EMORY L.J. 1887, 1922 n.152, 1943 (2004)).

A more relaxed standard of proof for retaliation claims would also threaten to transform Title VII's retaliation provision into a "thought control bill." Michigan Br. 11 (citing 100 Cong. Rec. 7254 (1964) (Sen. Ervin)). When a supervisor is falsely accused of acting on alleged bias, the accusation naturally brings up "feelings of anger, hurt, and resentment." *Id.* at 12. If the supervisor acknowledges those feelings, the timing of that admission alone "has likely created a sufficient issue of material fact to allow the accuser's retaliation claim to proceed to trial if the mixed-motives standard applies." *Id.* at. 13. "The net result is that imposing the mixed-motives burden-shifting analysis punishes employers for 'bad' but entirely predictable thoughts, where those thoughts cannot be said to have actually caused an adverse employment action." *Id.* Flipping the burden of proof "would amount to a presumption of malfeasance" in the context of routine employment decisions—a context where there is no basis for any such presumption. *Id.* at 14.

Indeed, even an employer that clearly articulates non-discriminatory policies in writing, and ensures that its supervisors apply those policies to all employees, could be held liable if a jury found that a mid-level supervisor harbored some subjective, retaliatory animus in the course of faithfully applying an objective, written policy. In such a case, the plaintiff would have been treated exactly the same as anyone else, but would prevail on the ground that he or she did not receive *special* treatment.

Although Congress is entitled to override the employment laws' fundamental objective to ensure *equal* treatment in that manner, the courts are not. *See* Pet. Br. 34–35.

II. THE MEDICAL SCHOOL IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

Nassar argues that the correct remedy is to "remand[] for a new trial under the new standard." Resp. Br. 35. This Court should, instead, exercise its discretion to apply the correct legal standard to the undisputed facts of this case and grant judgment as a matter of law.[2] Pet. Br. 37–38.

The facts of this case vividly illustrate the problems with a mixed-motive approach and the reasons to reject it. Nassar challenges the Medical School's determination that he had to remain a Medical School faculty member to retain his position as a full-time physician at the Hospital's AIDS Clinic. Pet. Br. 35–37; Resp. Br. 33. The objective, documentary evidence presented at trial by both the Medical School and Nassar showed that Fitz made that determination and announced it—twice—before the alleged impetus for retaliation even arose. JA 346–47; JA 396. Accordingly, even if retaliation later became an additional motive, there is no genuine dispute that the Medical School would have made the same decision even absent retaliation. JA 346–47; JA 396.

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[2] Nassar (at 1) suggests that the Medical School has conflated "but-for" causation with "sole" causation. To the contrary, the Medical School's opening brief expressly articulated, advocated, and applied "but-for" causation. *See* Pet. Br. 15.

Everything else is an irrelevant diversion. Nassar does not dispute that Fitz's purported admission of retaliatory animus—the only evidence of which was the dubious testimony of a disaffected former employee—came *after* Nassar resigned, and thus well *after* Fitz had announced his decision. *See* Resp. Br. 34. Although Nassar attempts to back-date his protected activity to a time before Fitz made the relevant decision, he does not and cannot respond to the Medical School's refutation of that argument in its opening brief. *See* Pet. Br. 37.

Nassar contends that actions of Hospital personnel call the timing or correctness of Fitz's decision into question. As explained in the Medical School's opening brief, however, none of those contentions goes to *Fitz's* subjective state of mind or refutes the clear written record of when and why he acted. *See* Pet. Br. 36–37; JA 120–24; JA 157–58; JA 316; JA 346–47; JA 396. Nassar contends, for example, that Sylvia Moreno, a subordinate employee at the Hospital, continued to attempt to hire Nassar even after Fitz made and twice announced his decision. Resp. Br. 34. But Nassar does not dispute that Moreno had no authority to hire hospital physicians and understood that Fitz had withheld the required approval. JA 77–87; JA 91–95; JA 316; JA 346–47. Nor does he dispute that Moreno's superiors never approved her efforts. JA 93–95; JA 294–97; JA 300–03; JA 314–15; JA 385.

Fitz also claims that his "replacement" was not a Medical School faculty member. Resp. Br. 35. But he does not dispute that, as the Medical School proved at trial, the Hospital hired that person for a

different job that was not within the scope of the operating agreement between the Hospital and the Medical School (JA 108–09; JA 169–71; JA 213–14; JA 227–29; JA 232–41)—a job that Nassar had rejected (JA 213–14; JA 243–44; JA 282–84).

In the end, all that matters is Fitz's state of mind, and the objective, documentary evidence shows without contradiction that Fitz enforced a written, nondiscriminatory policy—exactly what he should have done—before the alleged impetus for retaliation arose. Even under an incorrect legal standard, the district court recognized that Medical School "put forth a strong defense." Pet. App. 115. Under the correct legal standard, it is a winning defense.

CONCLUSION

For these reasons, this Court should vacate and remand for entry of judgment as a matter of law or a new trial.

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AMICUS CURIAE BRIEF

No. 12-484

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UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, PETITIONER

v.

NAIEL NASSAR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, authorizes a mixed-motive standard for retaliation claims.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents the question whether Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, authorizes a mixed-motive standard for retaliation claims. The Attorney General enforces Title VII against public employers, 42 U.S.C. 2000e-5(f)(1), and the Equal Employment Opportunity Commission enforces Title VII against private employers, 42 U.S.C. 2000e-5(a) and (f)(1). In addition, Title VII applies to the United States in its capacity as the Nation's largest employer. 42 U.S.C. 2000e-16 (2006 & Supp. V 2011). The United States, as the principal enforcer of the federal civil rights laws and the Nation's largest employer, has a substantial interest in the proper interpretation of Title VII.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-31a.

STATEMENT

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, makes it an "unlawful employment practice" to discriminate against any individual "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a); see also 42 U.S.C. 2000e-2(b)-(d) (prohibition for employment agencies, labor organizations, and training programs). Title VII also makes it an "unlawful employment practice" to discriminate against any individual "because" the individual has complained about, opposed, or participated in a proceeding about, prohibited discrimination. 42 U.S.C. 2000e-3(a). This latter form of discrimination is often referred to as "retaliation," although Title VII does not use that term.

In *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), a Title VII gender discrimination case, this Court held that the words "because of" in Section 2000e-2(a) encompass "mixed-motive" claims, *i.e.*, claims challenging an employment decision motivated by both legitimate and illegitimate factors. See *id.* at 240-242 (plurality opinion); *id.* at 258-260 (White, J., concurring in the judgment); cf. *id.* at 262-269 (O'Connor, J., concurring in the judgment) (focusing on burden of persuasion). The plurality held that a Title VII plaintiff need only show that a prohibited factor (*e.g.*, an employee's gender) played a "motivating" part in the employment decision. *Id.* at 244. The plurality also held, however, that an employer will not be held liable if it proves, by a preponderance of the evidence, that it would have made the same decision regardless of the illegitimate motive. See

id. at 244-245, 252-255. Justices White and O'Connor, separately concurring in the judgment, held that the illegitimate motive must play a "substantial" part in the employment decision to satisfy a plaintiff's burden of proof. *Id.* at 259 (White, J., concurring in the judgment); *id.* at 262, 265 (O'Connor, J., concurring in the judgment). And Justice O'Connor would have required the plaintiff to present "direct evidence" of the illegitimate factor before shifting the burden to the employer to show that it would have made the same decision regardless of that factor. *Id.* at 276.

Two years later, Congress enacted the Civil Rights Act of 1991 (1991 Act), Pub. L. No. 102-166, 105 Stat. 1071. "[I]n large part," the 1991 Act was "a response to a series of decisions of this Court," and Section 107 in particular was a direct "respon[se]" to this Court's decision in *Price Waterhouse*. *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 250-251 (1994). Section 107 codified one aspect of *Price Waterhouse* by providing a mixed-motive standard: "Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 1991 Act § 107(a), 105 Stat. 1075 (42 U.S.C. 2000e-2(m)). Section 107, however, abrogated a separate aspect of *Price Waterhouse* by declining to codify a complete defense to liability if the employer demonstrates that it would have taken the same action in the absence of the impermissible motive. Under the 1991 amendments, such a defense does not absolve an employer of liability, but instead restricts the remedies a court may order: declaratory relief, injunctive relief, attorney's fees and costs, but not

damages, reinstatement, or back pay. § 107(b), 105 Stat. 1075 (42 U.S.C. 2000e-5(g)(2)(B)).

In 2009, this Court decided *Gross* v. *FBL Financial Services, Inc.*, 557 U.S. 167. *Gross* held that the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, which prohibits discrimination "because of" age, 29 U.S.C. 623(a)(1), does not encompass a mixed-motive standard. 557 U.S. at 173. Unlike under Title VII, therefore, proof that age played some motivating role in the employer's adverse employment decision does not suffice to establish liability. Rather, a plaintiff alleging discrimination under the ADEA must prove "that age was the 'but-for' cause of the employer's adverse decision." *Id.* at 176. The Court distinguished the ADEA from Title VII on the ground that, in 1991, Congress amended Title VII to expressly include "motivating factor" language, but did not similarly amend the ADEA. See *id.* at 174. Those amendments, the Court concluded, make Title VII "materially different [from the ADEA] with respect to the relevant burden of persuasion." *Id.* at 173.

2. Respondent is a doctor of Middle Eastern descent who was previously employed by petitioner as a member of the medical school faculty. Pet. App. 2. In that capacity, respondent also served as a clinician at petitioner's affiliated hospital. *Ibid.* In June 2004, petitioner hired Dr. Beth Levine to oversee the HIV/AIDS clinic where respondent worked. *Id.* at 2-3. Respondent felt harassed by Dr. Levine, who heavily scrutinized his productivity and billing practices and made derogatory comments about "Middle Easterners." *Id.* at 3 (stating that "Middle Easterners are lazy," and that they "hired another one," referring to the hospital's hiring of another doctor of Middle Eastern descent). To avoid further

harassment, respondent began looking for a way to continue working at the hospital's clinic without being subject to Dr. Levine's supervision. *Id.* at 4.

Respondent eventually secured an offer to work directly for the hospital as a staff physician, beginning on July 10, 2006. Pet. App. 5. After receiving that offer, respondent sent a resignation letter to Dr. Gregory Fitz, the chair of internal medicine and Dr. Levine's immediate supervisor, resigning from the university. *Id.* at 4, 5. Respondent explained that his resignation was a result of Dr. Levine's "continuing harassment and discrimination," which "stems from [her] religious, racial and cultural bias against Arabs and Muslims that has resulted in a hostile work environment." *Id.* at 5. Dr. Fitz opposed the hospital's hiring of respondent, which prompted the hospital to withdraw its initial offer. *Id.* at 5-6.

3. Respondent filed a charge with the Equal Employment Opportunity Commission (EEOC), which found "credible[] testimonial evidence" that petitioner had retaliated against respondent for making allegations of discrimination against Dr. Levine. Resp. Br. 8 (quoting Pl. Trial Ex. 78). Respondent thereafter filed suit in the Northern District of Texas claiming, *inter alia*, that petitioner retaliated against him in violation of Title VII, 42 U.S.C. 2000e-3(a).[1]

A bifurcated jury trial followed. Pet. App. 6. In response to the retaliation claim, petitioner presented evidence that Dr. Fitz opposed the hospital's hiring of respondent because of a longstanding affiliation agreement between petitioner and the hospital that required the hospital to fill its physician posts with university

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[1] Respondent also sued for constructive discharge, and the jury so found, but that judgment was vacated on appeal and is not at issue here. See Pet. App. 6, 8-10, 15.

faculty. *Id.* at 4-5. At the liability phase, the jury was instructed that respondent "does not have to prove that retaliation was [petitioner's] only motive, but he must prove that [petitioner] acted at least in part to retaliate." *Id.* at 47.[2] The jury found petitioner liable for retaliation. *Id.* at 48.

During the liability phase, the jury was not instructed as to petitioner's "affirmative defense"—*i.e.*, that it would have taken the same action regardless of the impermissible motive. Instead, during the subsequent remedial phase, the district court explained that the jury may not award damages "for those actions which [petitioner] proves by a preponderance of the evidence that it would have taken even if it had not considered [respondent's] protected activity." Pet. App. 42-43. Finding that petitioner failed to make the requisite showing, the jury awarded respondent $438,167.66 in back pay and $3,187,500 in compensatory damages. *Id.* at 43-44. The district court denied petitioner's motions for judgment as a matter of law and for a new trial, but reduced the compensatory damages award to $300,000 pursuant to a statutory cap. *Id.* at 7, 24-25; see 42 U.S.C. 1981a(b)(3)(D).

4. The court of appeals affirmed in relevant part. Pet. App. 10-12, 15. On appeal, petitioner argued that the district court erred in instructing the jury based on a theory of mixed-motive retaliation. See Pet. C.A. Br. 42-44. Petitioner conceded that its argument was foreclosed by the court's previous decision in *Smith* v. *Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010), and the court of appeals so held. See Pet. App. 12 n.16. In *Smith*, the

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[2] The parties dispute whether petitioner timely objected to the jury instructions. See Pet. 23-25; Br. in Opp. 8-11; Pet. Cert. Reply Br. 1-4; Resp. Br. 14-15; see also Pet. App. 61-67.

Fifth Circuit had adhered to its prior precedent and held that the "burden shifting scheme" set forth in *Price Waterhouse*, which provided employers an affirmative defense to liability in mixed-motive cases, continued to apply to Title VII retaliation claims, notwithstanding this Court's decision in *Gross*. 602 F.3d at 328-330. Even though the jury instructions here departed from *Price Waterhouse* in that respect (*i.e.*, by providing a defense to damages, not liability), neither the parties nor the court suggested that the district court's instructions were inconsistent with *Smith*.

5. The court of appeals denied rehearing en banc, with six judges voting in favor of rehearing. Pet. App. 59-67.

SUMMARY OF ARGUMENT

Title VII's "motivating factor" provision (42 U.S.C. 2000e-2(m)), which establishes an employer's liability as long as a prohibited factor plays a motivating role in the challenged decision, applies not only to Title VII substantive discrimination claims but also to Title VII retaliation claims.[3] For that reason, this Court's decision in *Gross* v. *FBL Financial Services, Inc.*, 557 U.S. 167 (2009), has no bearing on this case.

A. Section 2000e-2(m)'s "motivating factor" standard applies directly to retaliation claims under Title VII. The statute prohibits the consideration of race, color, religion, sex, or national origin in "any employment practice." 42 U.S.C. 2000e-2(m). Retaliation is express-

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[3] This brief refers to discrimination claims under Section 2000e-2(a)-(d) as "substantive discrimination" claims, and to discrimination claims under Section 2000e-3(a) as "retaliation" claims, consistent with this Court's decision in *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 61-67 (2006). See also *Thompson* v. *North Am. Stainless, LP*, 131 S. Ct. 863, 868 (2011).

ly designated an "unlawful employment practice," 42 U.S.C. 2000e-3(a), and it follows from a consistent line of this Court's decisions that retaliation for complaining about discrimination based on race, color, religion, sex, or national origin is itself discrimination motivated (at least in part) by those protected characteristics. See *Gomez-Perez* v. *Potter*, 553 U.S. 474, 479-491 (2008); *CBOCS W., Inc.* v. *Humphries*, 553 U.S. 442, 446-457 (2008); *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 173-184 (2005); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969). Congress could have chosen to limit the mixed-motive standard to substantive discrimination claims by, for example, directly amending the substantive antidiscrimination provisions in Section 2000e-2(a)-(d), rather than enacting a new provision that applies to "any employment practice." Congress also could have limited Section 2000e-2(m) to claims based on the race, color, religion, sex, or national origin of the plaintiff. But Congress did neither. By its plain terms, Section 2000e-2(m) fully applies to Title VII retaliation claims.

Petitioner's arguments to the contrary are without merit. This Court's decisions refute the suggestion that Congress must explicitly refer to "retaliation" in a discrimination statute in order for the statute to encompass retaliation claims. And Section 2000e-2 is not "Title VII's discrimination provision" (Pet. Br. 5). Other subsections in Section 2000e-2 extend beyond the substantive antidiscrimination provisions codified therein and, like (m), apply directly to retaliation claims.

The negative inference petitioner seeks to draw from Congress's express reference to the antiretaliation provision in two other provisions is also unwarranted. The first (42 U.S.C. 1981a) is codified in a different statute

and the statutory history and context refute any such negative inference; and the second (42 U.S.C. 2000e-5(g)(2)(B)) was enacted more than 25 years before Section 2000e-2(m), and five years before this Court in *Sullivan* recognized that discrimination based on a protected characteristic encompasses retaliation for complaining about discrimination based on that characteristic. In any event, other Title VII provisions do not expressly mention the antiretaliation provision, yet plainly apply to retaliation claims.

B. The government's interpretation best effectuates Congress's intent to restore and expand protections against intentional employment discrimination. The 1991 amendments sought to restore the rule that prevailed in some lower courts before this Court's decision in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989). That rule applied equally to substantive discrimination and retaliation claims and, whatever the rule, courts generally applied the same causation standard to each. Petitioner would instead attribute to Congress a desire to adopt a new legal regime applying a different causation standard depending on the type of intentional discrimination alleged under Title VII. Nothing in the statute's text or legislative history supports that approach.

C. The government's interpretation is further supported by the longstanding and consistent position of the EEOC. Shortly after the 1991 amendments, the EEOC issued guidance announcing that it would apply the "motivating factor" standard to Title VII retaliation claims, and it has adhered to that position ever since. The EEOC's views are reasonable and entitled to deference. See *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335-1336 (2011).

D. Because Section 2000e-2(m)'s mixed-motive standard applies directly to Title VII retaliation claims, this Court's decision in *Gross* does not control. Petitioner and its amici argue that *Gross*'s "but for" causation standard is more practical and better policy, but that argument should be directed at Congress, not this Court. In any event, many of petitioner's policy concerns are equally applicable to substantive discrimination claims (to which the mixed-motive standard indisputably applies), and resolving this case in petitioner's favor thus would not achieve the clarity and uniformity it seeks. Petitioner contends that retaliation claims are different, but this Court has broadly construed Title VII's antiretaliation provision in the face of similar arguments raised in previous cases.

ARGUMENT

THE 1991 AMENDMENTS AUTHORIZE A MIXED-MOTIVE STANDARD FOR TITLE VII RETALIATION CLAIMS

In *Gross* v. *FBL Financial Services, Inc.*, 557 U.S. 167 (2009), this Court held that the ADEA does not authorize a mixed-motive standard for age discrimination claims, *i.e.*, proof that age played some motivating role in the employer's adverse employment decision does not, by itself, suffice to establish liability. Petitioner argues (Br. 21-24) that *Gross* dictates the unavailability of a mixed-motive standard for Title VII retaliation claims because, "just as in *Gross*, Congress did not extend its motivating-factor amendments in the 1991 [Act]" to Title VII's antiretaliation provision. Petitioner's premise is incorrect.

The "motivating factor" provision (42 U.S.C. 2000e-2(m)) applies directly to Title VII retaliation claims. That reading is confirmed by the statutory text, structure, context, and purpose, by this Court's repeated and

recent reaffirmation that retaliation *is* discrimination based on "race, color, religion, sex, or national origin," and by the EEOC's longstanding interpretation. Properly understood, Section 2000e-2(m) applies to Title VII retaliation claims and establishes an employer's liability as long as retaliation played a motivating role in the challenged decision, regardless of whether other factors also played a role. *Gross* therefore has no bearing on this case.

A. Title VII's "Motivating Factor" Provision Applies Directly To Retaliation Claims

1. The 1991 amendments added a "motivating factor" provision to Title VII. By its terms, an "unlawful employment practice" is established whenever a "complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 1991 Act § 107(a), 105 Stat. 1075 (42 U.S.C. 2000e-2(m)). That standard applies to Title VII retaliation claims.[4]

As an initial matter, Section 2000e-2(m)'s mixed-motive standard broadly applies to "any employment practice." 42 U.S.C. 2000e-2(m). Retaliation is expressly designated an "unlawful employment practice" under Title VII. See 42 U.S.C. 2000e-3(a) (defining an "unlawful employment practice"); 42 U.S.C. 2000e-3 (entitled "[o]ther unlawful employment practices"). Because "*any* employment practice" by definition includes the

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[4] The accompanying remedial provision applies whenever "an individual proves a violation under section 2000e-2(m)." 42 U.S.C. 2000e-5(g)(2)(B). Accordingly, if Section 2000e-2(m) applies to Title VII retaliation claims, so too does Section 2000e-5(g)(2)(B)'s remedial framework.

"unlawful employment practice[s]" prohibited by Section 2000e-3(a), a retaliation claim necessarily fits within the category of actions encompassed by Section 2000e-2(m).

Section 2000e-2(m) provides for liability when the challenged employment practice is motivated in part by "race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(m). A Title VII retaliation claim naturally fits within that language as well. That is the teaching of a consistent line of this Court's decisions. See *Gomez-Perez* v. *Potter*, 553 U.S. 474, 479-491 (2008) (retaliation for opposing age discrimination constitutes discrimination "based on age" under the ADEA's federal-sector provision); *CBOCS W., Inc.* v. *Humphries*, 553 U.S. 442, 446-457 (2008) (retaliation for opposing race discrimination constitutes discrimination based on race under 42 U.S.C. 1981); *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 173-184 (2005) (retaliation for opposing sex discrimination constitutes discrimination "on the basis of sex" under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969) (retaliation for opposing race discrimination constitutes discrimination based on race under 42 U.S.C. 1982).

In *Jackson*, for example, this Court held that Title IX, which prohibits sex discrimination in federally funded education programs, also prohibits retaliation, even though the "statute makes no mention of retaliation." See 544 U.S. at 173-176 (citation omitted). The Court explained that "retaliation is discrimination 'on the basis of sex' because it is an intentional response to the nature of the complaint: an allegation of sex discrimination." *Id.* at 174. Accordingly, the Court concluded that "when a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes in-

tentional 'discrimination' 'on the basis of sex,' in violation of Title IX." *Ibid.* In short, "retaliation in response to a complaint about sex discrimination *is* 'discrimination' 'on the basis of sex.'" *Id.* at 179 n.3 (emphasis added).

Similarly, in *Gomez-Perez*, this Court held that the federal-sector provision of the ADEA, 29 U.S.C. 633a(a), prohibits retaliation, even though that provision likewise makes no mention of retaliation. See 553 U.S. at 479-481. As the Court explained, "the statutory phrase 'discrimination based on age' includes retaliation based on the filing of an age discrimination complaint." *Id.* at 479; see *id.* at 488 ("[R]etaliation for complaining about age discrimination is 'discrimination based on age.'"). The Court followed its reasoning in *Jackson* even though the ADEA (unlike Title IX) contains an express right of action, *id.* at 482-483, and even though the ADEA's private-sector provision separately prohibits both substantive discrimination and retaliation, *id.* at 486-488.

In both cases, the Court grounded its decision in the text of the relevant statute. See *Gomez-Perez*, 553 U.S. at 484 ("*Jackson* did not hold that Title IX prohibits retaliation because the Court concluded as a policy matter that such claims are important. Instead, the holding in *Jackson* was based on an interpretation of the 'text of Title IX.'") (quoting *Jackson*, 544 U.S. at 173, 178). Indeed, the Court found the statutes clear enough to satisfy the "notice" requirements of the Spending Clause, *Jackson*, 544 U.S. at 183, and to provide the clear statement necessary to waive federal sovereign immunity, *Gomez-Perez*, 553 U.S. at 491. Both decisions also relied on this Court's 1969 decision in *Sullivan*, which recognized a claim for retaliation under 42 U.S.C.

1982, a statute guaranteeing property rights for all citizens equal to those "enjoyed by white citizens." See *Gomez-Perez*, 553 U.S. at 479-481, 484-485, 488, 490 n.6; *id.* at 493 n.1 (Roberts, C.J., dissenting); *Jackson*, 544 U.S. at 176-177; see also *CBOCS*, 553 U.S. at 446-457.

This Court's decisions thus firmly establish that retaliation for complaining about race discrimination *is* "discrimination based on race" (*Sullivan*, *CBOCS*)[5]; that retaliation for complaining about sex discrimination *is* "discrimination on the basis of sex" (*Jackson*); and that retaliation for complaining about age discrimination *is* "discrimination based on age" (*Gomez-Perez*). An employer who retaliates against an employee for complaining about discrimination based on race (or color, religion, sex, or national origin) thus *is* discriminating based on that protected characteristic. *A fortiori*, "race" (or "color," "religion," "sex," or "national origin") *is* a "motivating factor" within the meaning of Section 2000e-2(m).

2. Congress could have chosen to limit Section 2000e-2(m)'s "motivating factor" standard to substantive discrimination claims in a number of ways. For example, rather than enacting a new provision, Congress could have directly amended the substantive antidiscrimination provisions in Section 2000e-2(a)-(d). Those provisions, like Section 2000e-3(a)'s bar against retaliation, prohibit discrimination "because of" an impermissible factor. See 42 U.S.C. 2000e-2(a)-(d) ("because of"); 42

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[5] See *Gomez-Perez*, 553 U.S. at 479 ("While [Section] 1982 does not use the phrase 'discrimination based on race,' that is its plain meaning."); *CBOCS*, 553 U.S. at 459 (Thomas, J., dissenting) (While Section 1981(a) "does not use the modern statutory formulation prohibiting 'discrimination on the basis of race,' * * * that is the clear import of its terms.").

U.S.C. 2000e-3(a) ("because"). Yet Congress left each of those provisions untouched and instead codified the mixed-motive standard as an entirely new subsection that applies to "any employment practice." 42 U.S.C. 2000e-2(m).

Congress also could have limited Section 2000e-2(m) to claims involving *the complaining party's* race, color, religion, sex, or national origin. Instead, Section 2000e-2(m) applies whenever "the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice." 42 U.S.C. 2000e-2(m). That language encompasses retaliation because it makes clear that Section 2000e-2(m) applies regardless of the complaining party's membership in a protected class. In contrast, Title VII's substantive antidiscrimination provisions proscribe discrimination because of "such individual's" or "his" race, color, religion, sex, or national origin. See 42 U.S.C. 2000e-2(a)(1) ("such individual's"); 42 U.S.C. 2000e-2(a)(2) ("such individual's"); 42 U.S.C. 2000e-2(b) ("his"); 42 U.S.C. 2000e-2(c)(1) ("his"); 42 U.S.C. 2000e-2(c)(2) ("such individual's"); 42 U.S.C. 2000e-2(d) ("his"). If Congress had intended the "motivating factor" provision to apply to substantive discrimination claims alone, it could have simply tracked the language of those provisions. That Section 2000e-2(m) is *not* defined in terms of the complaining party's membership in a protected class reinforces the conclusion that it applies equally to retaliation claims. See *Jackson*, 544 U.S. at 179 (finding omission of the modifier "*such individual's*" significant in holding that Title IX protects a male coach from retaliation for complaining about sex discrimination against a female basketball team).

3. Petitioner nevertheless contends (Br. 17-20) that Section 2000e-2(m) does not apply to Title VII retaliation claims for three primary reasons. None withstands scrutiny.

a. Petitioner first argues (Br. 17) that the prohibited motivating factors are "race, color, religion, sex, or national origin," 42 U.S.C. 2000e-2(m)—not "retaliation." That observation is of little consequence under this Court's decisions. Petitioner fails to address, let alone distinguish, *Gomez-Perez*, *CBOCS*, *Jackson*, or *Sullivan*. As discussed above, the Court has repeatedly (and recently) held that retaliation for complaining about discrimination based on a protected characteristic *is* discrimination based on that protected characteristic. See pp. 12-14, *supra*. Under those decisions, any employer who retaliates against an employee because he complained about national origin discrimination (as the jury found in this case) has engaged in discrimination motivated (at least in part) by "national origin."

The fact that Section 2000e-2(m) contains no express mention of "retaliation" hardly gives rise to any inference that Congress intended to exclude retaliation claims from the provision's scope. The antiretaliation provision itself, 42 U.S.C. 2000e-3(a), does not use the word "retaliation." And the 1991 amendments came many years after this Court's decision in *Sullivan*. Given *Sullivan*, "there was no need for Congress to include explicit language about retaliation." *CBOCS*, 553 U.S. at 453-454 (concluding that the failure to include "the word 'retaliation'" when amending 42 U.S.C. 1981 in the 1991 Act was understandable in light of *Sullivan*); accord *Gomez-Perez*, 553 U.S. at 485, 488; *Jackson*, 544 U.S. at 176.

b. Petitioner also relies (Br. 17) on the placement of the "motivating factor" provision within Section 2000e-2 (which contains the substantive antidiscrimination provisions), and not within Section 2000e-3 (which contains the antiretaliation provision). As an initial matter, petitioner mistakenly characterizes "Section 2000e-2" as "Title VII's discrimination provision" (Br. 5, 17), and its reasoning proceeds from that erroneous premise. In fact, only certain subsections of Section 2000e-2 are appropriately characterized as "Title VII's discrimination provision[s]," most notably Section 2000e-2(a). And, as discussed above (pp. 14-15, *supra*), Congress did not directly amend those provisions.

More fundamentally, Congress has never treated the provisions within Section 2000e-2 as confined to substantive discrimination, to the exclusion of retaliation. For instance, Subsection (n), like Subsection (m), was added as part of the 1991 Act. See § 108, 105 Stat. 1076. Subsection (n) limits the opportunities to collaterally attack employment practices implemented as part of a litigated or consent judgment resolving "a claim of employment discrimination under the Constitution or Federal civil rights laws." 42 U.S.C. 2000e-2(n)(1)(A). On its face, that provision applies beyond the substantive antidiscrimination provisions in Section 2000e-2; indeed, it applies beyond Title VII. If an employee sues for retaliatory discharge under Section 2000e-3(a), and the court orders reinstatement, any person adversely affected by that judgment (*e.g.*, an employee who loses his seniority as a result) would generally be barred from collaterally attacking the judgment if he was given notice and an opportunity to be heard. 42 U.S.C. 2000e-2(n)(1). That Congress placed the consent-judgment

provision in 42 U.S.C. 2000e-2, and not in 42 U.S.C. 2000e-3, is of no moment: the text controls.

The national-security exemption, 42 U.S.C. 2000e-2(g), likewise demonstrates that petitioner's understanding of Section 2000e-2 is incorrect. That exemption provides that "it shall not be an unlawful employment practice for an employer * * * to discharge any individual from any position" if the individual has failed to fulfill any requirement imposed in the interest of national security. *Ibid.* That exemption plainly applies to a Title VII retaliatory discharge claim because retaliation is also an "unlawful employment practice." See pp. 11-12, *supra*; cf. *Cruz-Packer* v. *Chertoff*, 612 F. Supp. 2d 67, 69, 70-71 (D.D.C. 2009) (dismissing substantive discrimination and retaliation claims brought under Title VII's federal-sector provision based on 42 U.S.C. 2000e-2(g)). Again, the mere placement in Section 2000e-2 says nothing about the subsection's application to retaliation claims brought under Section 2000e-3(a).

Viewed in context, the fact that Congress codified the "motivating factor" provision as part of Section 2000e-2 has little probative force. Had Congress codified the retaliation provision within Section 2000e-2, for instance as 42 U.S.C. 2000e-2(z), instead of as 42 U.S.C. 2000e-3(a), the analysis would remain the same, and Section 2000e-2(m)'s "motivating factor" standard would apply in either event.

c. Petitioner briefly cites (Br. 23) two other provisions in which Congress expressly referenced Title VII's antiretaliation provision and suggests that its failure to do so in Section 2000e-2(m) evidences an intent to exclude such claims. That is incorrect.

i. Contrary to petitioner's characterization (Br. 23), Congress did not "amend[] Title VII's retaliation provisions in 1991." The only purported amendment petitioner identifies is Section 102(a) of the 1991 Act, which authorizes the recovery of compensatory and punitive damages. § 102(a), 105 Stat. 1072. Section 102, however, did not amend Title VII directly. Instead, Congress created a new statutory provision codified at 42 U.S.C. 1981a. And that provision applies to other discrimination laws in addition to Title VII. See 1991 Act § 102(a)(2), 105 Stat. 1072. In that distinct context, Congress specified that compensatory and punitive damages are available in cases of "unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C. 2000e-2, 2000e-3, 2000e-16]." *Id.* § 102(a), 105 Stat. 1072.

As the text of that provision indicates, Congress, by listing the specific forms of "unlawful intentional discrimination" for which damages would be available, sought to distinguish between those unlawful practices, on the one hand, and a practice made unlawful because of its disparate impact, on the other hand. There is thus no basis for inferring from Section 1981a that, in any provision in which Congress fails to specifically refer to retaliation, Congress intends to exclude retaliation claims from the provision's scope.

Any such negative inference is fully rebutted when one considers the 1991 amendments to Section 1981a's neighboring provision, 42 U.S.C. 1981. In response to this Court's decision in *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), Congress amended Section 1981 to make clear that its protections applied even after contract formation. 1991 Act § 101, 105 Stat. 1071-

1072; see *Landgraf*, 511 U.S. at 251. Even though the text makes no mention of "retaliation," Congress plainly intended the amended provision to apply to all forms of intentional employment discrimination, including "retaliation." See, *e.g.*, H.R. Rep. No. 40, 102d Cong., 1st Sess. Pt. 1, at 92 & n.92 (1991) (*House Report Pt. 1*); H.R. Rep. No. 40, 102d Cong., 1st Sess. Pt. 2, at 37 (1991) (*House Report Pt. 2*). In *CBOCS*, this Court so held. 553 U.S. at 450-451, 452-454, 457. If Congress's specific reference to the Title VII antiretaliation provision in Section 1981a meant that any provision that fails to contain such a reference necessarily excludes retaliation, this Court would have reached the opposite result in *CBOCS*. Section 1981a therefore is of no assistance to petitioner.

ii. Petitioner also cites (Br. 23) Section 2000e-5(g)(2)(A), which precludes courts from ordering certain relief, such as reinstatement, when the employee was discharged for reasons "other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title." 42 U.S.C. 2000e-5(g)(2)(A). It is true that, under the government's reading, Congress could have omitted the final phrase "or in violation of section 2000e-3(a) of this title," because retaliation for complaining about discrimination based on race, color, religion, sex, or national origin is itself discrimination based on those same protected characteristics. But the negative inference petitioner seeks to draw is unwarranted for several reasons.

First, the substance of that provision was enacted as part of the Civil Rights Act of 1964—more than 25 years before Section 2000e-2(m). Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(g), 78 Stat. 261. "'[N]egative implications raised by disparate provisions are strong-

est' in those instances in which the relevant statutory provisions were 'considered simultaneously when the language raising the implication was inserted.'" *Gomez-Perez*, 553 U.S. at 486 (quoting *Lindh* v. *Murphy*, 521 U.S. 320, 330 (1997)) (brackets in original). Here, the two provisions were not "enacted together." *Ibid.*[6]

Second, the government's interpretation relies in substantial part on decisions of this Court that postdate the 1964 enactment, including the 1969 *Sullivan* decision. This Court has assumed that Congress was aware of *Sullivan* when enacting subsequent statutes. See *Gomez-Perez*, 553 U.S. at 485, 488, 490 n.6 (noting that the ADEA's federal-sector provision was enacted "five years after the decision in *Sullivan*" and that "Congress was presumably familiar with *Sullivan*"); *Jackson*, 544 U.S. at 176 (noting that Title IX was enacted three years after *Sullivan* and that it is "realistic to presume that Congress was thoroughly familiar with" that decision) (citation omitted). The same cannot be said of a statutory provision enacted five years beforehand.

In any event, there are a number of provisions in Title VII that plainly apply to retaliation claims even though they contain no express reference to Section 2000e-3(a). As noted above, several subsections of Section 2000e-2 fall into that category. See pp. 17-18, *supra*. But there are other provisions as well. Many of the

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[6] The 1991 amendments reorganized Section 2000e-5(g) to create separate paragraphs and subparagraphs. § 107(b), 105 Stat. 1075. Although Congress retained the language of the original 1964 Act in the newly designated Subparagraph (A), it did not use that language as a model for the mixed-motive remedial provision in Subparagraph (B). Unlike Subparagraph (A), Section 2000e-5(g)(2)(B) references neither "discrimination on account of race, color, religion, sex, or national origin," nor a "violation of section 2000e-3(a)." It simply cross-references Section 2000e-2(m).

enforcement provisions, for example, indisputably apply to all "unlawful employment practices," including retaliation. See 42 U.S.C. 2000e-5(b)-(d), (f), (g)(1); see also 42 U.S.C. 2000e-5(i)-(k) (applying to all actions brought "under this section" or "subchapter"). Yet the antiretaliation provision is separately enumerated in only one of those provisions: Section 2000e-5(g)(2)(A). Cf. 42 U.S.C. 2000e-5(a) (referring generally to "section 2000e-3"). Accordingly, the most that can be said is that Congress sometimes refers expressly to the antiretaliation provision, and sometimes does not. Cf. *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341-342 (1997) ("[T]hat other statutes have been more specific [in referring specifically to "former employees"] proves only that Congress *can* use the unqualified term 'employees' to refer only to current employees, not that it did so in this particular statute.").[7]

4. As petitioner notes (Br. 18), several courts of appeals have held that Section 2000e-2(m)'s "motivating factor" standard does not apply to retaliation claims.[8] Every one of the decisions cited by petitioner, however, predated this Court's decisions in *Jackson*, *CBOCS*, and *Gomez-Perez*. And not a single one cites *Sullivan*, on

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[7] The same reasoning applies with more force to 38 U.S.C. 4311 (cited at Pet. Br. 19), a different discrimination statute adopted at a different time by a different Congress. See *CBOCS*, 553 U.S. at 454 (rejecting argument that Congress's failure to mention the "word 'retaliation'" in amending 42 U.S.C. 1981 was intended to exclude retaliation because "Congress has included explicit antiretaliation language in other civil rights statutes").

[8] Contrary to petitioner's suggestion (Br. 18), the D.C. Circuit has not decided that issue. See *Porter* v. *Natsios*, 414 F.3d 13, 19 (2005). The case petitioner cites involved only "pre-1991 claims of retaliation under Title VII." *Borgo* v. *Goldin*, 204 F.3d 251, 255 n.6 (D.C. Cir. 2000).

which this Court relied in each of those decisions. The court of appeals' decisions cited by petitioner simply assume that "race, color, religion, sex, or national origin" cannot be a "motivating factor" in a retaliation case, and that Congress has to expressly mention "retaliation." See, *e.g.*, *Kubicko* v. *Ogden Logistics Servs.*, 181 F.3d 544, 552 n.7 (4th Cir. 1999); *McNutt* v. *Board of Trs. of the Univ. of Ill.*, 141 F.3d 706, 707-709 (7th Cir. 1998); *Woodson* v. *Scott Paper Co.*, 109 F.3d 913, 933 (3d Cir.), cert. denied, 522 U.S. 914 (1997). Those assumptions do not survive this Court's intervening decisions for the reasons explained, and the other arguments advanced in support of limiting Section 2000e-2(m) to substantive discrimination claims are unpersuasive for the reasons set forth above. Cf. *Gross*, 557 U.S. at 183-184 & n.5 (Stevens, J., dissenting) (noting majority's rejection of widespread agreement among circuit courts); *Desert Palace, Inc.* v. *Costa*, 539 U.S. 90, 95 (2003) (rejecting near-unanimous agreement among courts of appeals).

The Fifth Circuit, in a decision issued after petitioner's opening brief in this case, recently concluded that Section 2000e-2(m) does not encompass retaliation claims, although the court considered it a "close question." *Carter* v. *Luminant Power Servs. Co.*, No. 12-10642, 2013 WL 1337365, at *3 (Apr. 3, 2013). Unlike the earlier court of appeals' decisions, the Fifth Circuit addressed this Court's decisions in *Gomez-Perez*, *CBOCS*, *Jackson*, and *Sullivan*. And the court recognized the "force" of arguing that "race" is a "motivating factor" whenever an employer retaliates against an individual for complaining about race discrimination. *Id.* at *2. The court nevertheless concluded that such reasoning should not be applied to Title VII. *Id.* at *2-*3.

As explained, however, this Court's decisions cannot be so easily distinguished.[9]

B. Applying The "Motivating Factor" Provision To Retaliation Claims Best Effectuates Congressional Intent

The 1991 amendments were intended to "restore and strengthen" protections against intentional employment discrimination. *House Report Pt. 2*, at 1. Applying the "motivating factor" provision to Title VII retaliation claims best effectuates that intent. Conversely, the statute's history provides no support for petitioner's theory that Congress intended to apply a mixed-motive standard to all intentional discrimination claims under Title VII *except* retaliation claims.

1. In amending Title VII to add the "motivating factor" provision, Congress expressed that it was "clarifying," "reaffirming," and "restor[ing]" Congress's original intent in enacting the Civil Rights Act of 1964. 1991 Act § 107, 105 Stat. 1075 ("clarifying"); *House Report*

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[9] The Fifth Circuit's asserted distinctions between Title VII and *Gomez-Perez* do not withstand scrutiny. The court noted that the ADEA's federal-sector provision was enacted "only five years" after *Sullivan*, whereas the 1991 amendments were adopted seventeen years later. *Carter*, 2013 WL 1337365, at *3. That *CBOCS* (decided the same day as *Gomez-Perez*) relied heavily on *Sullivan* to interpret the same 1991 amendments, 553 U.S. at 446-457, strongly suggests that Congress did not simply forget about *Sullivan*. The court also noted that, unlike here, *Gomez-Perez* did not involve a situation in which "private employers are already subjected to an 'antidiscrimination' and an 'antiretaliation' prohibition, and Congress adds a provision that does not mention retaliation." *Carter*, 2013 WL 1337365, at *3. In fact, the circumstances in *Gomez-Perez* were analogous: private employers were already subject to a substantive antidiscrimination provision and an antiretaliation provision, and Congress added a federal-sector provision that did not mention retaliation. 553 U.S. at 486.

Pt. 2, at 2 ("reaffirming"); *House Report Pt. 1*, at 47 ("restor[ing]").[10] According to the House Reports, the amendments were designed to "restore the rule applied" by certain courts of appeals (and the EEOC) before *Price Waterhouse*: "that any discrimination that is actually shown to play a role in a contested employment decision may be the subject of liability." *House Report Pt. 2*, at 18; see *id.* at 17-18 & n.31 (citing court of appeals' decisions); *House Report Pt. 1*, at 46 & n.41, 48 (citing court of appeals' decisions and EEOC decisions).

The "rule" Congress sought to "restore" was not limited to substantive discrimination claims; it applied equally to retaliation claims. The House Reports, for example, relied heavily on *Bibbs* v. *Block*, 778 F.2d 1318, 1321-1324 (8th Cir. 1985) (en banc). See *House Report Pt. 1*, at 46 n.41, 48; *House Report Pt. 2*, at 18 n.31. The "rule" announced in that case, which Congress "en-

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[10] Petitioner suggests that if Congress had intended to clarify its original intent to allow a mixed-motive standard, Section 2000e-2(m) would have been unnecessary. Br. 19 (citing *Gross*, 557 U.S. at 178 n.5). But Congress's decision to codify that portion of *Price Waterhouse* is unsurprising given the fractured nature of that decision; the uncertainty over the appropriate standard (*i.e.*, whether plaintiffs had to demonstrate a "motivating" or "substantial" factor, and whether the two standards were qualitatively different); and the confusion over the "direct evidence" requirement (*i.e.*, whether "direct evidence" was required to shift the burden of proof and, if so, what qualified as "direct evidence"). By codifying a mixed-motive standard in Section 2000e-2(m), Congress resolved much of that uncertainty. To prove a violation under Section 2000e-2(m), a plaintiff must demonstrate that the impermissible consideration was a "motivating" factor, 42 U.S.C. 2000e-2(m); that showing can be satisfied with any evidence (not just "direct evidence"), *Desert Palace*, 539 U.S. at 98-101; and, unlike under *Price Waterhouse*, proof that an employer would have made the same decision regardless of the impermissible motive is no defense to liability.

dorse[d]" and "restore[d]," *House Report Pt. 1*, at 48, had been applied to retaliation claims. See *Johnson* v. *Legal Servs. of Ark., Inc.*, 813 F.2d 893, 899-900 (8th Cir. 1987); *EEOC* v. *General Lines, Inc.*, 865 F.2d 1555, 1560 (10th Cir. 1989). Indeed, at that time, courts generally applied the same causation standard (however defined) to retaliation claims under Section 2000e-3(a), as they did to discrimination claims under Section 2000e-2(a). See, *e.g.*, *Woodson*, 109 F.3d at 934; *Zanders* v. *National R.R. Passenger Corp.*, 898 F.2d 1127, 1135 (6th Cir. 1990); *Ross* v. *Communications Satellite Corp.*, 759 F.2d 355, 364-366 (4th Cir. 1985); *Williams* v. *Boorstin*, 663 F.2d 109, 116-117 (D.C. Cir. 1980), cert. denied, 451 U.S. 985 (1981).

Contrary to its stated intent to "restore" and "reaffirm," petitioner would attribute to Congress the opposite intent: to create a new legal regime that carves out an exception for "retaliation," varying the causation standard depending on the type of intentional discrimination at issue. The legislative history strongly suggests that Congress did not intend such a stark departure from the status quo. See *McNutt*, 141 F.3d at 708-709 (acknowledging that it could identify "no logical reason why Congress would have changed the mixed-motive standard for one class of unlawful employment practices while allowing *Price Waterhouse* to operate in another"); cf. *CBOCS*, 553 U.S. at 450, 454 (giving effect to Congress's intent to "restore" an interpretation that prevailed before this Court's decision in *Patterson*).

2. Applying Section 2000e-2(m)'s "motivating factor" standard to Title VII retaliation claims also better effectuates Congress's general intent in adopting the 1991 amendments. Congress sought to provide "additional protections against unlawful discrimination in employ-

ment" and "additional remedies * * * to deter unlawful harassment and intentional discrimination in the workplace." 1991 Act § 2, 105 Stat. 1071. The 1991 amendments were designed to "restore and strengthen," not constrict, the protections available to victims of intentional employment discrimination. *House Report Pt. 2*, at 1; see *Landgraf*, 511 U.S. at 250. And the "motivating factor" provision was intended to prohibit "*all*" forms of "invidious consideration of sex, race, color, religion, or national origin in employment decisions." *House Report Pt. 2*, at 17.

To be sure, Congress may have primarily focused on substantive discrimination claims of the sort at issue in *Price Waterhouse*. But that is not indicative of an intent to provide victims of retaliation with lesser protection. To the contrary, this Court has recognized that broad protection against retaliation is critical to securing the primary objective of guaranteeing "a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status." *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 63 (2006) (*Burlington Northern*). "Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses," *id.* at 67, and "fear of retaliation is the leading reason why people stay silent," *Crawford* v. *Metropolitan Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271, 279 (2009) (brackets and citations omitted). Construing Section 2000e-2(m)'s "motivating factor" provision narrowly to exclude retaliation claims "threaten[s] to undermine Title VII's twin objectives of deterring employers from discriminatory conduct and redressing the injuries suffered by victims of discrimination." *House Report Pt. 2*, at 17.

C. The EEOC's Longstanding Interpretation Is Reasonable And Entitled To Deference

The EEOC has consistently taken the view that Section 2000e-2(m)'s "motivating factor" standard applies directly to Title VII retaliation claims. That longstanding and consistent interpretation is reasonable and entitled to deference.

Shortly after the 1991 amendments, the EEOC issued enforcement guidance advising that "it will find liability and pursue injunctive relief whenever retaliation plays any role in an employment decision." *Enforcement Guidance on Recent Developments in Disparate Treatment Theory* (July 14, 1992), 1992 WL 1364355, at *6 n.14 (*Enforcement Guidance*). The guidance explained that "[t]he Commission has a unique interest in protecting the integrity of its investigative process, and if retaliation were to go unremedied, it would have a chilling effect upon the willingness of individuals to speak out against employment discrimination." *Ibid.* Accordingly, the EEOC announced that it "will find cause when retaliation is a motivating factor in an employment decision, and evidence showing that the employer would have taken the same action even absent its retaliatory motive would pertain only to whether the charging party is eligible for individual relief." *Ibid.*[11]

The EEOC's compliance manual advances the same position. 2 *EEOC Compliance Manual* § 8-II(E)(1) (May 20, 1998), http://www.eeoc.gov/policy/docs/

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[11] The enforcement guidance acknowledged that Section 107 of the 1991 Act did not specifically mention "retaliation," but still found no reason to deviate from the EEOC's "long-standing rule." *Enforcement Guidance*, at *6 n.14. As described in the text, the EEOC subsequently elaborated on its reasoning, making clear that it understood Section 2000e-2(m) to apply directly to retaliation claims.

retal.pdf ("If there is credible * * * evidence that retaliation was a motive for the challenged action, 'cause' should be found. Evidence as to any legitimate motive for the challenged action would be relevant only to relief, not to liability.").[12] The compliance manual explains that "Section 107 applies to retaliation," and disagrees with the courts of appeals to have held otherwise. *Id.* § 8-II(E)(1) n.45 (citing cases); *ibid.* ("The basis for finding 'cause' whenever there is credible * * * evidence of a retaliatory motive is Section 107 of the [1991 Act]."). The Commission further explains that its interpretation is consistent with the courts' "long held" view "that the evidentiary framework for proving employment discrimination based on race, sex, or other protected class status also applies to claims of discrimination based on retaliation." *Ibid.* And, it continues, a contrary interpretation "that permits proven retaliation to go unpunished" would "undermine[] the purpose of the anti-retaliation provisions of maintaining unfettered access to the statutory remedial mechanism." *Ibid.*

The EEOC's longstanding and consistent interpretation of the statute provides additional support for the conclusion that the "motivating factor" provision encompasses Title VII retaliation claims. "[T]he agency's policy statements, embodied in its compliance manual and internal directives * * * reflect 'a body of experience and informed judgment.'" *Federal Express Corp.*

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[12] As originally worded, the compliance manual referred to credible "direct" evidence of a retaliatory motive. § 8-II(E)(1). The EEOC no longer requires "direct" evidence following this Court's decision in *Desert Palace*. See *Effect of Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003), on Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory (July 14, 1992)* (as amended Jan. 16, 2009), http://www.eeoc.gov/policy/docs/disparat.html.

v. *Holowecki*, 552 U.S. 389, 399 (2008) (citations omitted). As such, they warrant a measure of respect and deference. See *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335-1336 (2011) (giving weight to EEOC's consistent position set forth in compliance manual); *Federal Express*, 552 U.S. at 399 (deferring to EEOC guidance that had "been binding on EEOC staff for at least five years"); *Robinson*, 519 U.S. at 345-346 (EEOC's positions "carry persuasive force given their coherence and their consistency with a primary purpose of antiretaliation provisions"); see also *Thompson* v. *North Am. Stainless, LP*, 131 S. Ct. 863, 870-871 (2011) (Ginsburg, J., concurring) (deferring to EEOC's "longstanding views" as expressed in compliance manual).

D. Because The 1991 Amendments Authorize A Mixed-Motive Standard For Title VII Retaliation Claims, *Gross* Does Not Control

This Court's decision in *Gross* rested in large part on the ground that Congress added a "motivating factor" provision to Title VII, but not to the ADEA. See 557 U.S. at 174-175. Because Congress *did* add a "motivating factor" provision to Title VII, and because that provision applies directly to the Title VII retaliation claim at issue here, *Gross* has no bearing on this case.

Petitioner and its amici, however, contend that the "but for" standard adopted in *Gross* is more practical and represents better policy. Those arguments cannot overcome the statutory text, structure, or purpose. Nor can they override the EEOC's longstanding position that Title VII authorizes a mixed-motive standard for retaliation claims. In any event, they fail on their own terms.

1. Many of the arguments advanced by petitioner and its amici suffer from the same flaw: they apply equally to Title VII substantive discrimination claims to which the mixed-motive standard indisputably applies. Petitioner argues, for example, that the mixed-motive standard is "difficult to apply." Br. 25 (quoting *Gross*, 557 U.S. at 179); see *id.* at 26-28. Petitioner contends that mixed motives are "easy to allege" and "difficult for defendants to disprove," precluding summary judgment and prompting the settlement of "meritless" cases. *Id.* at 31-32. And petitioner emphasizes the need for a uniform standard. Pet. Br. 28-30.

Deciding this case in petitioner's favor would not resolve any of those concerns. A mixed-motive standard would still apply to other claims, and the uniformity petitioner envisions is illusory. Regardless of the outcome here, a standard other than *Gross*'s "but for" cause would continue to apply to substantive discrimination claims under Title VII (42 U.S.C. 2000e-2(m)), to other federal statutes where the causation standard is express (see Pet. Br. 19; Equal Employment Advisory Council Amicus Br. 13-15), in contexts where the expert agency has issued an authoritative interpretation adopting a burden-shifting standard (see *NLRB* v. *Transportation Mgmt. Corp.*, 462 U.S. 393, 401-403 (1983); *Gross*, 557 U.S. at 179 n.6), and to constitutional claims (see *Mount Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 285-287 (1977); *Gross*, 557 U.S. at 179 n.6).[13]

Creating a new, divergent standard for a subset of Title VII intentional discrimination claims would only exacerbate the purported confusion. Under petitioner's

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[13] For this reason and others, the Court should decline petitioner's invitation to consider whether *Gross* should be applied to other statutes not before the Court.

theory, juries in cases alleging both substantive discrimination and retaliation under Title VII would confront two different causation standards. Cf. Pet. Br. 29 n.1. The objectives identified by petitioner would be better served by applying the same causation standard to claims arising under the *same* statute. To the extent petitioner and its amici disagree with the policy decisions reflected in the 1991 amendments to Title VII, their concerns should be directed at Congress, not this Court. See *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224, 237-238 (2007).

2. Petitioner, however, contends (Br. 33-35) that its stated concerns are "especially acute in the retaliation context" because retaliation is even easier to allege and more difficult to disprove than substantive discrimination. In petitioner's view, employees will strategically complain of discrimination, however meritless, in order to shield themselves from an adverse employment action. Employers, in turn, will be deterred from making necessary employment decisions for fear of being accused of retaliation.

That same argument was made, unsuccessfully, in several recent Title VII retaliation cases. Faced with similar expressed concerns, the Court broadly construed the antiretaliation provision to extend to third parties (*Thompson*), to employees that do not speak out on their own initiative (*Crawford*), and to circumstances beyond employer- or workplace-related retaliatory acts (*Burlington Northern*).[14] Indeed, to the extent the Court has deemed it appropriate to subject retaliation claims to differential treatment, it has interpreted the antiretal-

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[14] See Resp. Br. at 24-27, *Thompson*, *supra*; Pet. Br. at 29-31, 47 n.16 & Reply Br. at 8-10, *Burlington Northern*, *supra*; cf. Resp. Br. at 33-34, *Crawford*, *supra*.

iation provision to provide *more* protection than the substantive antidiscrimination provisions. See *Burlington Northern*, 548 U.S. at 61-67 (Section 2000e-3(a) is not limited to the materially adverse employment actions required by Section 2000e-2(a).). Petitioner's arguments thus provide no basis for construing Section 2000e-2(m) to exclude retaliation claims from its terms.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 20 U.S.C. 1681(a) provides in pertinent part:

Sex

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance * * *

* * * * *

2. 29 U.S.C. 633a(a) provides:

Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the Govern-

ment Accountability Office, and the Library of Congress shall be made free from any discrimination based on age.

3. 42 U.S.C. 1981 provides:

Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

4. 42 U.S.C. 1981a provides:

Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5, 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C. 2000e-2, 2000e-3, 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5, 2000e-16] (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of title 29 and the regulations implementing section 791 of title 29, or who violated the

requirements of section 791 of title 29 or the regulations implementing section 791 of title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(3) Reasonable accommodation and good faith effort

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 [42 U.S.C. 12112(b)(5)] or regulations implementing section 791 of title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates

that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5(g)].

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

(4) Construction

Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title.

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section—

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

(d) Definitions

As used in this section:

(1) Complaining party

The term "complaining party" means—

(A) in the case of a person seeking to bring an action under subsection (a)(1) of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

(B) in the case of a person seeking to bring an action under subsection (a)(2) of this section, the Equal Employment Opportunity Commis-

sion, the Attorney General, a person who may bring an action or proceeding under section 794a(a)(1) of title 29, or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 [42 U.S.C. 12111 et seq.].

(2) Discriminatory practice

The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a) of this section.

5. 42 U.S.C. 1982 provides:

Property rights of citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

6. 42 U.S.C. 2000e-2 provides:

Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of

such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employ-

ee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where reli-

gion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 [50 U.S.C. 781 et seq.].

(g) National security

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and em-

ploy any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the

results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any em-

ployer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's

decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C. 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(*l*) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders

(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws—

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had—

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to—

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28.

7. 42 U.S.C. 2000e-3 provides:

Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this

subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

(b) Printing or publication of notices or advertisements indicating prohibited preference, limitation, specification, or discrimination; occupational qualification exception.

It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

8. 42 U.S.C. 2000e-5 (2006 & Supp. V 2011) provides:

Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the

"respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the

date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a)[1] of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

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[1] So in original. Probably should be subsection "(b)".

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to

grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this subchapter, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

(B) In addition to any relief authorized by section 1981a of this title, liability may accrue and an ag-

grieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such

respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to in-

tervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have

worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in

an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attor-

ney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) Provisions of chapter 6 of title 29 not applicable to civil actions for prevention of unlawful practices

The provisions of chapter 6 of title 29 shall not apply with respect to civil actions brought under this section.

(i) Proceedings by Commission to compel compliance with judicial orders

In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals

Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, title 28.

(k) Attorney's fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert

fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

9. 42 U.S.C. 2000e-16 provides in pertinent part:

Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

* * * * *

(d) Section 2000e-5(f) through (k) of this title applicable to civil actions

The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder, and the same interest to compen-

sate for delay in payment shall be available as in cases involving nonpublic parties..[1]

* * * * *

[1] So in original.

AMICUS CURIAE BRIEF

No. 12-484

In The Supreme Court of the United States

UNIVERSITY OF TEXAS,
SOUTHWESTERN MEDICAL CENTER,
Petitioner,

v.

NAIEL NASSAR, M.D.,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

Amicus curiae[1] the American Association of University Professors ("AAUP" or "Association") is a national membership organization of 40,000 faculty members and research scholars in all the academic disciplines. Founded in 1915, AAUP is the nation's oldest and largest body dedicated to promoting the academic profession by defining fundamental professional values and standards for higher education, advancing the rights of academics, particularly as those rights pertain to academic freedom and shared governance, and promoting the interests of higher education and research.

One of AAUP's principal tasks, often undertaken in collaboration with other higher education organizations, is the formulation of national standards for the academic community. AAUP policy statements address the protection of academic freedom and tenure, procedural standards for the renewal of faculty appointments, the faculty role in institutional governance, the elimination of discrimination, and many other facets of academic life. State and federal courts throughout the country, including this Court, frequently refer to AAUP policy statements in resolving disputes involving faculty members, their institutions, and their students. *Delaware State Coll. v. Ricks*, 449 U.S. 250, 264 n.3 (1980) (Stewart, J., dissenting); *Bd. of Regents v.*

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[1] Pursuant to SUP. CT. R. 37.6, *Amicus* submits that no counsel for any party participated in the authoring of this document, in whole or in part. In addition, no other person or entity, other than AAUP, has made any monetary contribution to the preparation and submission of this document. Pursuant to SUP. CT. R. 37.3, counsel of record for all parties have consented to this filing in letters on file with the Clerk of the Court.

Roth, 408 U.S. 564, 579 n.17 (1972). The seminal 1940 Statement of Principles on Academic Freedom and Tenure, prepared jointly by AAUP and the Association of American Colleges and Universities, is the "most widely-accepted academic definition of tenure." *Krotkoff v. Goucher Coll.*, 585 F.2d 675, 679 (4th Cir. 1978); *see also Cohen v. Bd. of Trs.*, 867 F.2d 1455, 1469 (3d Cir. 1989) (en banc). In 1970, Interpretive Comments were developed to supplement the 1940 statement.[2] (The term "1940 Statement" includes the 1970 Interpretive Comments). Over two hundred educational organizations and learned societies have endorsed the 1940 Statement.[3]

In 1971, AAUP adopted Recommended Institutional Regulations on Academic Freedom and Tenure, setting forth procedures to safeguard against decisions adversely affecting a faculty member that would violate principles of academic freedom, impermissibly discriminate, or be based on insufficient consideration(referred to herein as "Recommended Institutional Regulations").[4]

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[2] The 1940 Statement and the 1970 Interpretative Comments were developed by representatives of AAUP and the Association of American Colleges, now called the Association of American Colleges and Universities ("AACU"). The AACU is not a party to this brief.

[3] AM. ASS'N OF UNIV. PROFESSORS, *1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE WITH 1970 INTERPRETIVE COMMENTS*, AAUP: POLICY DOCUMENTS & REPORTS 3, 7-11 (10th ed. 2006), *available at* http://www.aaup.org/endorsers1940-statement..

[4] AM. ASS'N OF UNIV. PROFESSORS, *RECOMMENDED INSTITUTIONAL REGULATIONS ON ACADEMIC FREEDOM*, BULL. OF THE AM. ASS'N OF UNIV. PROFESSORS, VOL. 96, 2010, AT 101, 106, *available at* www.aaup.org/file/regulations-academic-freedom-tenure.pdf

Commensurate with AAUP's concern about procedures for faculty evaluation is its deep interest in the academic employment relationship and its historic commitment to the elimination of discrimination based on national origin, race, sex, and any factors not directly relevant to professional performance. AM. ASS'N OF UNIV. PROFESSORS, AAUP: POLICY DOCUMENTS & REPORTS 229 (10th ed. 2006).

AAUP frequently submits *amicus* briefs in the Supreme Court and the federal circuits in cases that implicate AAUP policies or otherwise raise legal issues important to higher education or faculty members. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Adams v. Trs. of the Univ. of North Carolina-Wilmington*, 640 F.3d 550 (4th Cir. 2011); *Crue v. Aiken*, 370 F.3d 668 (7th Cir. 2004); *Hong v. Grant*, 403 Fed. Appx. 236 (9th Cir. 2010); *Ass'n of Christian Schs. Int'l v. Stearns*, 362 Fed. Appx. 640 (9th Cir. 2010). Additionally, AAUP's well-established policy related to an academic institution's internal grievance procedure is mischaracterized in this instant case in an *amicus* brief filed by the American Council on Education (hereinafter referred to as "ACE"). ACE *Amicus* Br. 13–14. Therefore, AAUP stands uniquely situated to provide clarification to this Court regarding this AAUP policy and to support the Respondent's position that both the law and AAUP policies support use of a mixed motive standard of proof in Title VII retaliation cases.

SUMMARY OF ARGUMENT

The Fifth Circuit Court of Appeals correctly held that a mixed motive standard of proof should apply in Title VII retaliation cases. Neither the law nor any policies cited in the briefs of the Petitioner or *amici* support application of a "but for" causation standard in such retaliation cases.

I. Both the law and AAUP policies support use of a mixed motive standard of proof in Title VII retaliation cases. In its *amicus* brief to this Court, ACE relied on AAUP's policies for internal grievance procedures at educational institutions to buttress its claim that a higher "but for" standard of proof should be utilized in Title VII retaliation cases. There is no support for that contention. AAUP policies espouse the use of a mixed motive standard of proof entirely consistent with the mixed motive standard in Title VII cases.

In addition, the mixed motive standard of proof operates as the appropriate standard in the context of claims involving educational institutions. Specifically, the AAUP policies cited in ACE's *amicus* brief focus extensively on procedural protections for faculty. Such procedures encourage the fundamental goals of preventing and remedying discrimination, harassment, and retaliation. Utilizing AAUP's policies as a justification to impose a higher burden on retaliation claims betrays the basic purpose of these policies and is not supported by the law, legislative history or case precedent.

As a matter of law, there is no basis for creating a different standard of proof in cases where a Plaintiff alleges that they have been discriminated against in violation of Title VII than in cases where

a Plaintiff alleges that they have been retaliated against in violation of Title VII. Resp't Br. 15–20. Rather, the legislative history and the Court's prior opinions support the use of one unitary standard for any claims brought pursuant to Title VII.

II. There is no support for the proposition that principles of academic freedom warrant the imposition of a "but for" standard of causation in Title VII retaliation cases. ACE claims that academic freedom principles demand the application of a differential standard of proof in Title VII retaliation cases. This argument is baseless. Courts repeatedly have distinguished between the principle that the judiciary will not intrude into the affairs of an educational institution in matters related to academics as opposed to the need for judicial review of employment discrimination claims at educational institutions. Academic freedom principles do not provide educational institutions with the freedom to discriminate or retaliate against their employees. Courts have rejected previous efforts to insulate academic institutions from court review of discrimination claims and the Petitioner and *amici* have not presented the Court with any reason to do otherwise in this case.

ARGUMENT

I. The Mixed Motive Standard is Appropriate in Retaliation Cases Under Title VII

The mixed motive standard is appropriate in Title VII retaliation cases. Ensuring that complaints regarding such retaliatory discrimination are protected is essential to ferreting out invidious

discrimination. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997); *see Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006) ("Interpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act's primary objective depends").

There is no basis for creating a different standard of proof in cases where a Plaintiff alleges that they have been discriminated against in violation of Title VII than in cases where a Plaintiff alleges that they have been retaliated against in violation of Title VII. Resp't Br. 15–20. Rather, the legislative history and the Court's prior opinions support the use of one unitary standard for proving violations of Title VII.

The decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), does not dictate a change in the standard for Title VII retaliation cases. The *Gross* Court made clear that its focus was on ADEA claims. *See Gross*, 557 U.S. at 174 ("This Court has never held that this burden-shifting framework [of *Price Waterhouse*] applies to ADEA claims. And, we decline to do so now."). Moreover, this Court previously has emphasized that each statute must be read in its own context. Determining the appropriate burden of proof in cases where a Plaintiff alleges retaliation under Title VII rests within the context of Title VII.

The mixed motive standard of proof clearly serves as the appropriate standard in the context of claims involving educational institutions. While ACE's *amicus* brief relies on AAUP policies to support the use of the higher "but for" standard, the opposite holds true. ACE *Amicus* Br. 13–14. As ACE

correctly states, AAUP policies have been widely adopted at most colleges and universities, *supra* at 13, and those policies support the use of a mixed motive standard in discrimination and retaliation cases.

AAUP's recommended policies directly oppose discrimination in employment, much like the substantive provisions in Title VII. For instance, AAUP's procedural policies emphasize the importance of investigating and addressing complaints of discrimination in academia. As the Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments explains: "The possibility of a violation of academic freedom or of improper discrimination is of vital concern to the institution as a whole, and where either is alleged it is of cardinal importance to the faculty and the administration to determine whether substantial grounds for the allegation exist." AM. ASS'N OF UNIV. PROFESSORS, AAUP: POLICY DOCUMENTS & REPORTS 19 (10th ed. 2006).

More importantly here, the AAUP policies cited in ACE's *amicus* brief focus extensively on procedural protections for faculty. These procedural protections apply broadly to general employment matters involving faculty and include provisions on providing notice to faculty of potentially adverse employment actions and for appeal mechanisms in the event of an adverse employment action.

Such notice and appeal procedures encourage the fundamental goals of preventing and remedying discrimination, harassment, and even retaliation. As ACE explains, "[s]uch internal processes are an effective and efficient means of remedying and deterring discriminatory conduct within the

academy." ACE *Amicus* Br. 14. These mechanisms allow employers and employees to jointly resolve their disputes. Moreover, they allow the employer to affirmatively correct discrimination or retaliation at an early stage. This protects the interests of the employee and also often limits or prevents illegal actions from occurring.[5]

Using AAUP's policies as a justification to impose a higher burden on retaliation claims by employees of academic institutions betrays the fundamental purpose of these policies. Moreover, employees and employers may cease using AAUP's policies as problem solving tools if they perceive that the policies will be utilized to defeat retaliation claims. Under such conditions, employees may no longer support, and in fact may oppose the use of AAUP's policies, thereby undercutting the adoption, use and benefits of such policies for employees, employers, and society in general.

AAUP policies provide no support for the argument that a "but for" causation standard should be applied in Title VII retaliation cases rather than a mixed motive standard. For example, AAUP's Recommended Institutional Regulations 10 "Complaints of Violation of Academic Freedom or of Discrimination in Nonreappointment" – which ACE relies on as a policy adopted at most colleges and universities – specifically states that "[i]f the faculty member succeeds in establishing a prima facie case,

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[5] ACE claims that the facts in this case support the notion of academic employees fabricating retaliation. In the instant case, however, there was no appeal, invocation of a grievance procedure, or application of AAUP's remedial procedures. ACE presents no factual basis or legal support for this claim.

it is incumbent upon those who made the decision against reappointment to come forward with evidence in support of their decision." AM. ASS'N OF UNIVERSITY PROFESSORS, *supra*, at 106. AAUP policies support the use of a mixed motive standard for both discrimination and retaliation cases, a standard entirely consistent with the traditional standard of proof under Title VII.

II. Policies Specific to Educational Institutions do not Justify the "but for" Standard of Proof in Retaliation Cases

Here, Petitioners, and numerous *amici*, argue that the higher "but for" causation standard should be applied in Title VII retaliation cases and that the "but for" causation standard is particularly appropriate for educational institution employers. *See* ACE *Amicus* Br. 11–12. ("This Court has long held that the academic freedom of colleges and universities is entitled to robust constitutional protection. . . Adopting a mixed-motive, burden shifting framework for Title VII retaliation claims would encourage judicial intrusion into sensitive matters of academic freedom. . ."); *see also* NSBA *Amicus* Br. 30 (stating that, in the absence of the "but for" standard, "school districts...[must] choose between avoiding crippling litigation costs and taking non-retaliatory actions to advance their educational goals"). In doing so, ACE makes numerous arguments narrowly applicable to educational institutions. Such arguments miss the point.

The central issue in this case is the interpretation of a statute that applies to most employers across the country. While this includes educational institutions, the statute does not treat educational institutions differently from any other employer. The question before the Court in this case is the standard of proof that would be applicable to cases involving *any* covered employer. *Amici* have failed to present any compelling support for the use of a "but for" causation standard in retaliation cases.

First, no argument has been advanced that any matters related to educational institutions bear upon the legislative intent behind the anti-retaliation provision of Title VII. There is neither citation to any relevant statutory language specifically addressing educational institutions nor any citation to any legislative history involving educational institutions that would illustrate the legislative intent of Congress.

Second, ACE's *amicus* brief does not argue that there should be a different standard for educational institutions. ACE fails to provide any evidence or substantiation for a differential standard of proof for educational institutions, nor does ACE articulate the specific circumstances or dividing lines in which such a differential standard could be applied. ACE has provided no compelling reason to apply a different standard of proof to educational institutions, and the language of the statute does not provide such justification.

Third, there are no specific policies related to educational institutions that would justify a disparate interpretation of the Title VII retaliation provision. The Title VII retaliation provision applies to employees throughout the country. As noted by

ACE, educational institutions account for less than 3% of all employees in the United States. Allowing specific issues related to educational institutions to determine the interpretation of statutory provisions applicable to all employees is misguided.

In any event, there is no basis for arguing that educational institutions have any specific circumstances justifying either the application of a higher standard in cases involving educational institutions in particular or a different standard of proof for academic institutions as opposed to other employers. While ACE seeks to use the status of educational institutions to justify application of a higher or differential standard of proof, it provides no persuasive support for why this is necessary.

ACE also claims that the principles of academic freedom warrant the application of a higher or differential standard of proof. ACE *Amicus* Br. 5 ("Adopting a mixed-motive, burden-shifting framework for Title VII retaliation claims would encourage judicial intrusion into sensitive matters of academic freedom. . ."). From the perspective of AAUP, an organization deeply committed to the protection of academic freedom, this case does not present issues related to the complex constitutional meaning of academic freedom, which includes the academic freedom of professors and of universities. Academic freedom principles assure the freedom of faculty to speak out on matters of institutional as well as public concern. *See generally* MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM (2009). Moreover, while constitutional academic freedom argues for judicial deference to university decisions made on academic grounds, it

has never been understood to insulate universities against judicial review of employment discrimination or of violations of constitutionally protected expression. The Second Circuit aptly explained this distinction in a Title VII case involving an educational institution: "It is our task, then, to steer a careful course between excessive intervention in the affairs of the university and the unwarranted tolerance of unlawful behavior." *Powell v. Syracuse Univ.*, 580 F.2d 1150, 1154 (2d Cir. 1978). Academic freedom does not encompass the freedom to discriminate against employees of the institution.

While judicial deference to peer review committees is appropriate to the extent that they base their decision on professional grounds, courts must intervene when peer review committees or university administrators violate the law. Accordingly, the Third Circuit held in a First Amendment case that while courts are not "part of an appellate review process for state university tenure termination proceedings," courts must adjudicate matters involving legal issues in such cases and "[t]he central inquiry in this case involves not a 'substantial evidence' or 'arbitrary and capricious' scrutiny of the [internal university] Judicial Committee proceedings but 'an independent examination of the record . . . in order that the controlling legal principles may be applied to the actual facts of the case.'" *Johnson v. Lincoln Univ.*, 776 F.2d 443, 449–50 (3d Cir. 1985) (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

Similarly, in *Haimowitz v. University of Nevada*, 579 F.2d 526 (9th Cir. 1978), an assistant professor who was denied tenure asserted that his faculty colleagues retaliated against him based on

protected speech. The court rejected the district court's conclusion that the faculty Personnel Committee was only "advisory" and therefore that "the improper bias is too far removed from the final decisionmaking to be of constitutional moment." *Id.* at 530. The court emphasized that faculty "input is critical" in tenure decisions. It concluded that "[t]he recommendation of the fellow members of a department will surely be a major, if not determinative, factor in the final employment or tenure decision." *Id.* The court remanded with instructions that the lower court follow *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), which provided "the proper method for resolving claims of retaliatory termination." *Id.*

ACE also argues that adoption of a higher or differential standard is necessary to avoid intrusion into the academic decision-making process. *See* ACE *Amicus* Br. 12–13. There is no evidence that a higher or differential standard of proof in retaliation cases is necessary to preserve academic decision-making, and ACE has provided none in its brief beyond its bare assertion. Rote reference to the rights of academic institutions does not suffice to support a higher or differential standard of proof. Neither ACE nor any other party has provided substantive support for a higher or differential standard for educational institutions in this case on the basis of academic freedom principles.

Amicus curiae AAUP submits that the burden-shifting approach this Court has applied to retaliation claims under the First Amendment should be equally applicable to Title VII retaliation claims brought by faculty members. The burden-shifting approach adopted by AAUP in its policies

more than two generations ago has proven its value and practicality over the ensuing decades.

CONCLUSION

For the foregoing reasons, the Court should affirm the Fifth Circuit's decision that "motivating factor" analysis is the appropriate standard in Title VII retaliation claims.

Respectfully submitted on April 10, 2013.

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AMICUS CURIAE BRIEF

RECORD
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BRIEFS

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In the
Supreme Court of the United States

UNIVERSITY OF TEXAS
SOUTHWESTERN MEDICAL CENTER,
Petitioner,

v.

NAIEL NASSAR,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION AND SIX OTHER HIGHER EDUCATION ORGANIZATIONS IN SUPPORT OF PETITIONER

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AMICI ON THIS BRIEF

American Council on Education

American Association of Community Colleges

American Association of State Colleges and Universities

Association of American Medical Colleges

Association of American Universities

Association of Public and Land-grant Universities

National Association of Independent Colleges and Universities

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STATEMENT OF INTEREST[1]

The American Council on Education, American Association of Community Colleges, American Association of State Colleges and Universities, Association of American Medical Colleges, Association of American Universities, Association of Public and Land-grant Universities, and National Association of Independent Colleges and Universities submit this brief as *amici curiae* in support of petitioner. *Amici* and their member institutions have a substantial interest in the impact this case will have on the academic freedom and employment practices of the nation's academic institutions.

The American Council on Education ("ACE") is a non-profit organization that was founded in 1918, whose members include more than 1,800 public and private colleges, universities, and educational organizations throughout the United States. ACE represents all sectors of American higher education—public and private, large and small, and denominational and nondenominational. ACE strives to enhance the vitality and well-being of the nation's higher education institutions through advocacy, research, leadership, and program initiatives. ACE regularly submits amicus briefs in

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to this filing in letters on file with the Clerk's office.

cases that raise legal issues important to higher education.

The American Association of Community Colleges ("AACC") is the primary advocacy organization for the nation's community colleges. AACC represents nearly 1,200 two-year, associate degree-granting institutions.

The American Association of State Colleges and Universities ("AASCU") is a higher education association of more than 400 public colleges, universities, and systems whose members share a learning- and teaching-centered culture, a historic commitment to underserved student populations, and a dedication to research and creativity that advances their regions' economic progress and cultural development.

The Association of American Medical Colleges ("AAMC") is a not-for-profit association representing all 141 accredited U.S. and 17 accredited Canadian medical schools; nearly 400 major teaching hospitals and health systems; and 90 academic and scientific societies. The AAMC supports the entire spectrum of education, research, and patient care activities conducted by its member institutions. Of particular concern to the AAMC in this case is the need to protect the ability of medical schools to exercise educational judgments in relation to their faculty employees.

The Association of American Universities ("AAU") an association of 61 leading public and private research universities in the United States and Canada. Founded to advance the international standing of U.S. research universities, AAU today

focuses on issues that are important to research intensive universities, such as funding for research, research policy issues, and graduate and undergraduate education.

The Association of Public and Land-grant Universities ("APLU") is a research and advocacy organization of public research universities, land-grant institutions, and state university systems with member campuses in all 50 states, U.S. territories, and the District of Columbia.

The National Association of Independent Colleges and Universities ("NAICU") serves as the unified national voice of private, nonprofit higher education in the United States. It has nearly 1,000 members nationwide, including traditional liberal arts colleges, major research universities, special service educational institutions, and schools of law, medicine, engineering, business, and other professions. NAICU represents these institutions on policy issues primarily with the federal government, such as those affecting student aid, taxation, and government regulation.

SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). Congress has expressly permitted plaintiffs to prove discrimination claims under this provision by demonstrating that unlawful discrimination was a "motivating factor" in the challenged employment decision. 42 U.S.C. § 2000e-2(m). As a prophylactic measure to safeguard the Act's core protection against discrimination, the statute also prohibits employers from retaliating against an employee "because he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a). Congress has not authorized plaintiffs to satisfy Title VII's retaliation provision through the "mixed-motive" standard of proof permitted under the discrimination provision.

I. Title VII's retaliation provision requires plaintiffs to prove but-for causation. That congressional choice is sound policy. Compared to a straightforward but-for standard, the mixed-motive burden-shifting regime employed below is difficult to apply. Moreover, the very nature of competing evidentiary showings makes such claims especially difficult to resolve at summary judgment. Consequently, a mixed-motive framework would place undue pressure on defendants to settle in order to avoid the high costs and uncertainty of protracted litigation. Congress has decided that these practical difficulties are tolerable to deter

infringement of Title VII's core protections against discrimination. But it has not made the same choice for retaliation claims. Neither should this Court.

These practical concerns pose an acute threat to the academic freedom of *amici*'s member institutions, which employ millions of Americans across the country. This Court has long held that the academic freedom of colleges and universities is entitled to robust constitutional protection. And the freedom to set a school's academic mission necessarily entails the freedom to determine *who* will further those academic goals. Adopting a mixed-motive, burden-shifting framework for Title VII retaliation claims would encourage judicial intrusion into sensitive matters of academic freedom and empower disgruntled employees to bring academic fights into the courts. This is especially troubling given that most colleges and universities provide extensive internal grievance procedures to report discriminatory behavior and to resolve disputes. Under a mixed-motive regime, plaintiffs might strategically invoke those commonly-used procedures to manufacture an appearance of retaliation. The but-for standard urged by petitioner would lessen these concerns by correctly keeping the burden on plaintiffs to prove that non-academic, retaliatory motives actually caused an employment decision. This Court should adopt that more workable standard.

II. This result is compelled by Title VII's clear text and the logic of this Court's precedents. The retaliation provision's use of "because" requires but-for causation. This Court held as much in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009). The

Court's earlier decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), is inapposite and obsolete. The plurality and concurring opinions in that case adopted a mixed-motive, burden-shifting framework for discrimination claims under Title VII based on the purpose behind Title VII's core protection against unconstitutional discrimination. But the decision did not address Title VII's prophylactic retaliation provision. Moreover, experience has proven that the framework endorsed by *Price Waterhouse* is unworkable and undesirable. To the extent the decision would apply here, it should be overruled.

The clear indication from Congress is that this is the correct result. Following the *Price Waterhouse* decision, Congress amended Title VII's statutory text to expressly adopt a "mixed-motive" standard for discrimination claims, by clarifying that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (emphasis added). But Congress left the neighboring retaliation provision untouched. When Congress amends one provision but not another, the presumption must be that this distinction is intentional and meaningful.

ARGUMENT

I. The Mixed-Motive, Burden-Shifting Regime Employed By The Decision Below Poses Practical Problems That Threaten Academic Freedom.

As petitioner aptly demonstrates (at 14–24), and as *amici* explain below, the plain text of Title VII's retaliation provision requires proof of but-for causation. The text alone should be dispositive in this case. Yet, the illogic of the lower court's decision to the contrary is further confirmed by the practical difficulties that follow from it. The mixed-motive, burden-shifting regime contemplated in *Price Waterhouse* and adopted by the court below is difficult to apply. Indeed, defendants often cannot be sure whether they are defending against a mixed-motive allegation or not until after discovery. Even then, the framework makes it extremely difficult for defendants to secure summary judgment against meritless claims. These practical problems pose a particularly serious threat to the academic freedom of *amici*'s member institutions. The but-for standard adopted in *Gross* avoids these problems by keeping the burden of proof where it normally rests in civil litigation—on the plaintiff.

1. As this Court recognized in *Gross*, the mixed-motive "burden-shifting framework is difficult to apply." 557 U.S. at 179. Specifically, "in cases tried to a jury, courts have found it particularly difficult to craft an instruction to explain its burden-shifting framework." *Id.* And jury confusion in this area has predictably resulted in a high rate of reversible error in mixed-motive cases. *See Visser v. Packer Eng'g*

Assocs., Inc., 924 F.2d 655, 661 (7th Cir. 1991) (en banc) (Flaum, J., dissenting). Thus, as Justice Kennedy predicted in *Price Waterhouse*, application of the framework has led to "disarray in an area of the law already difficult for the bench and bar." 490 U.S. at 279 (Kennedy, J., dissenting); *see also* Br. for Pet'r 25–28.

The Fifth Circuit's jurisprudence is illustrative. In *Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010), the case that controlled the analysis of the panel below, the court of appeals struggled to determine whether the case presented to it was a mixed-motive case or a pretext case, *compare id.* at 333–34 (majority), *with id.* at 339–40 (Jolly, J., dissenting)—a distinction that is dispositive for the burden of proof. *See id.* at 333 ("[T]he reality is that the defendant will always prefer a pretext submission that requires the plaintiff to prove that there was no legitimate motivation (but-for) while the plaintiff will always prefer a mixed-motive submission with the burden on the defendant."). Even the *Smith* majority, which felt constrained to apply a mixed-motive framework, acknowledged that allowing a plaintiff to change the burden based on how he pleads his case is "[i]llogical." *Id.*

Moreover, it is especially difficult to defeat mixed-motive claims at summary judgment. By its very nature, the mixed-motive framework requires competing evidence. The plaintiff alleges that retaliation was a substantial factor in the challenged employment decision, the employer attempts to rebut that allegation with evidence that either there was no retaliatory motive or that it would have taken the

employment action even in the absence of the retaliatory motive, and the plaintiff presents additional evidence to defeat the employer's defense. Except in frivolous cases, this evidentiary battle will almost always result in a "genuine dispute as to [a] material fact" that will prevent the defendant from obtaining summary judgment. Fed. R. Civ. P. 56(a).

As a result, the mixed-motive standard adopted by the court below places undue pressure on defendants to settle claims. When faced with a retaliation claim, employers cannot even be sure at first which framework of proof will apply—under the Fifth Circuit's view, the plaintiff need not decide whether he is bringing a pretext claim or a mixed-motive claim until after discovery. *See Xerox*, 602 F.3d at 333. But what the employer can be sure of is a costly and invasive discovery process, followed by a full trial, in which it bears the burden to disprove the plaintiff's allegation, unless it settles the claim. Most employers will choose not to bear those costs, and consequently most plaintiffs will receive relief even for meritless claims. And as the cost of providing higher education continues to rise, *amici*'s member institutions will feel even greater pressure to settle claims to avoid the risks of litigation.

A but-for standard would avoid these practical problems. Adopting "the ordinary default rule that plaintiffs bear the risk of failing to prove their claims," *Schaffer v. Weast*, 546 U.S. 49, 56 (2005), would honor the simple, administrable system of proof that the statute contemplates: The plaintiff would carry his burden only when he can prove that he suffered an adverse employment action "*because*

he has opposed any practice made an unlawful employment practice by [Title VII], or *because* he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a) (emphases added); *see also Meachem v. Knolls Atomic Power Lab.*, 554 U.S. 84, 92 (2008) ("Absent some reason to believe that Congress intended otherwise, ... we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief." (internal quotation marks omitted)). And when the plaintiff fails to meet his burden, summary judgment would be available to the defendant, as it is in other circumstances.

2. While the ill effects of a mixed-motive retaliation regime would be detrimental to all employers, they would prove especially harmful to the academic freedom of *amici*'s member institutions. The mixed-motive framework adopted by the lower court and urged by respondent would trench on the constitutional right of colleges and universities to pursue their academic mission through employment decisions. Because mixed-motive allegations are difficult to disprove, and especially difficult to defeat at summary judgment, academic institutions facing such claims would face undue pressure to settle against their academic interests. Requiring but-for causation in Title VII retaliation claims would safeguard academic freedom by ensuring that colleges and universities will face liability only when plaintiffs can show that employment decisions resulted from unlawful retaliation, rather than constitutionally protected academic motives.

This Court has "long recognized that ... universities occupy a special niche in our constitutional tradition." *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (citing *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Keyishian v. Bd. of Regents of Univ. of State of New York*, 385 U.S. 589, 603 (1967)); *see also Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (Academic freedom "long has been viewed as a special concern of the First Amendment."). "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." *Keyishian*, 385 U.S. at 603. Academic freedom means "[t]he freedom of a university to make its own judgments as to education." *Bakke*, 438 U.S. at 312. And the federal courts have a "responsibility to safeguard th[is] academic freedom." *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985).

Faculty employment decisions are critical to academic freedom. For an educational institution to retain "the freedom to make decisions about *how* and *what* to teach," *Bd. of Regents of Univ. of Wisc. Sys. v. Southworth*, 529 U.S. 217, 237 (2000) (Souter, J., concurring in the judgment) (emphases added), it must possess the freedom "to determine for itself on academic grounds *who* may teach." *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring in the result) (internal quotation marks omitted) (emphasis added). "Academic freedom thrives ... on autonomous decisionmaking by the academy itself." *Ewing*, 474 U.S. at 226 n.12. Thus, just as a school must be

afforded considerable leeway in "the selection of its student body," *Bakke*, 438 U.S. at 312, it must have autonomy over the selection of its faculty. And "good faith on the part of a university" should be "presumed absent a showing to the contrary." *Grutter*, 539 U.S. at 329 (internal quotation marks omitted).

Requiring proof of but-for causation in Title VII retaliation claims would properly protect these constitutional principles. A but-for standard would properly place the burden on plaintiffs to demonstrate that unlawful retaliation—not constitutionally protected academic choices or other factors—caused the employment actions they challenge. And it would enable employers to obtain summary judgment when the plaintiffs cannot meet their burden. This would provide colleges and universities the assurance that employment decisions made on academic grounds would not, outside of the circumstances contemplated by Congress, be subjected as a matter of course to full-blown litigation in which minimal evidence could shift the burden to the institutions to justify the legitimacy of their academic choices.

Allowing proof of mixed-motive causation in Title VII retaliation claims, by contrast, would trench on academic freedom. As explained above, the mixed-motive framework would enable plaintiffs to re-grind academic axes through costly litigation that will pressure higher education institutions to settle. Moreover, because the mixed-motive framework invites allegations of multiple contributing causes, plaintiffs will be able to present minimal evidence—

here, a third-party's subjective impression of a an administrator's statement, *see* Br. for Pet'r 10—to cast doubt on legitimate academic decisions in order to shift the burden of proof to the defendant. At that point, academic institutions will be forced to disclose and submit to judicial scrutiny sensitive academic matters the First Amendment protects. Judges and juries would be put in a position to second-guess academic decisions including tenure, administrative appointments, and research funding. Meanwhile, the risk that a jury will reject the legitimate (and actual) academic motives in favor of the plaintiff's minimal evidence is significant, as this case itself demonstrates. Thus, the intrusion into protected matters would be inevitable and potentially wide-ranging.

These concerns are heightened with respect to retaliation claims, given the internal grievance procedures adopted by most colleges and universities. Many academic institutions already have well-established internal procedures to handle faculty grievances, many of which are modeled on guidelines published by the American Association of University Professors ("AAUP"). The AAUP is an association of 48,000 professors and academics across 450 campuses that issues policy documents and reports. It endeavors to develop standards for sound academic practices and works for acceptance of the standards by the higher education community. *See* AAUP, About: Mission & Description, http://www.aaup.org/about/mission-description. The AAUP's *Recommended Institutional Regulations on Academic Freedom and Tenure* provide a model procedure for faculty grievances. *See* AAUP, *Recommended*

Institutional Regulations on Academic Freedom and Tenure (2009), http://www.aaup.org/file/regulations-academic-freedom-tenure.pdf. The procedures allow faculty members to petition a grievance committee to complain of perceived discrimination based on race, sex, religion, national origin, and other protected characteristics. *See id.* ¶ 10. Moreover, those committees are often composed entirely of peer faculty members. *See id.* ¶ 16.

Such internal processes are an effective and efficient means of remedying and deterring discriminatory conduct within the academy. At the same time, the widespread adoption and proactive use of these procedures increases the likelihood that disgruntled employees will invoke them to create the appearance of retaliation—as respondent appears to have done in this case. *See* Br. for Pet'r 9–10. Indeed, here, it is "uncontroverted that Fitz did not learn that Nassar had claimed illegal discrimination until he received Nassar's resignation letter." *Id.* at 36. And Fitz had rejected respondent's transfer request *before* receiving the resignation letter. *See id.* at 35–36. Yet, the medical school faces retaliation liability under the mixed-motive framework employed by the Fifth Circuit. Thus, this very case illustrates how procedures designed for the valuable purpose of preventing and punishing discrimination might perversely be used to accuse colleges and universities of retaliatory conduct. In a mixed-motive regime, the invocation of such procedures prior to an adverse employment action could be proof enough to shift the burden to the college or university to justify its actions and thus compel a trial. Under a but-for, non-shifting standard a plaintiff could not

use a university's procedures against it to get past summary judgment and force a settlement.

In addition, academic institutions operate under the oversight of accrediting bodies that set and enforce standards relevant to academic programs. In the case of medical schools, the Liaison Committee on Medical Education accredits programs leading to the M.D. degree in the United States. Among the Committee's accreditation standards are faculty requirements that constrain the medical schools' personnel decisions. *See generally* Liaison Comm. on Med. Educ., *Functions and Structure of a Medical School: Standards for Accreditation of Medical Education Programs Leading to the M.D. Degree* (2012), http://www.lcme.org/functions.pdf. One of those standards provides context and support to petitioner's decision not to transfer supervision of respondent from the medical school to the hospital. *See id.* ¶ ER-10 ("In the relationship between a medical education program and its clinical affiliates, the educational program for medical students must remain under the control of the program's faculty at each instructional site."); *see also* Br. for Pet'r 7–8. Yet, the decision below imposes liability on petitioner for adherence to that standard (and petitioner's agreement with its affiliated hospital). Thus, this very case demonstrates how the mixed-motive, burden-shifting regime urged by respondent and adopted by the decision below would permit plaintiffs, like respondent, to second-guess academic decisions premised on accreditation standards—and other appropriate academic factors—with greater frequency and damaging consequence.

These academic concerns affect a large group of employers. Across the country, roughly 3.6 million faculty and staff members are employed at private and public universities, colleges, community colleges and professional schools. *See* Dep't of Labor, Bureau of Labor Statistics, Occupational Employment Statistics, May 2011, http://www.bls.gov/oes/tables.htm.[2] Together, these academic institutions employ nearly 3% of the US labor force as educators, researchers, administrators, and other staff. *Id.*[3] Meanwhile, "[t]he number of retaliation claims filed with the EEOC has proliferated in recent years." *Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 555 U.S. 271, 283 (2009) (Alito, J., concurring in the judgment); *see also* U.S. EEOC, Charge Statistics: FY 1997 Through FY 2012, http://www.eeoc.gov/eeoc/statistics/enforcement/charg

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[2] To compute this approximate total, *amici* utilized the Bureau of Labor Statistics' May 2011 OES data. According to that data, the total number of personnel employed by community colleges (including private, state, and local government schools) is 777,880, and the total number of personnel employed by colleges, universities, and professional schools (including private, state, and local government schools) is 2,857,640. These totals can be found within the May 2011 "All Data" spreadsheet, respectively, at row 63322, column J, and row 64210, column J.

[3] *Amici* computed this approximate percentage from the Bureau of Labor Statistics' 2011 OES data as well. As explained above, private and public universities, colleges, community colleges and professional schools employ 3,635,520 personnel, which amounts to 2.8% of the 128,278,550 total personnel employed in the United States. Total U.S. employment data can be found at row 2, column J of the May 2011 "All Data" spreadsheet.

es.cfm (last visited Mar. 5, 2013) (showing that the number of Title VII retaliation charges has nearly doubled in the past fifteen years). Adopting a mixed-motive framework for retaliation claims "would likely cause this trend to accelerate." *Crawford*, 555 U.S. at 283. Thus, such a standard's threat to academic freedom is no negligible harm. It cuts deeply to the core of academic institutions' constitutional freedoms and broadly across this large sector of the workforce.

To be clear, *amici* do not contend that the Constitution's protection of their academic freedom should immunize colleges and universities from meritorious Title VII retaliation claims. On the contrary, *amici*'s concern is that a mixed-motive, burden-shifting regime will enable plaintiffs to advance *meritless* retaliation claims in a manner that will endanger academic freedom. The framework adopted by the Fifth Circuit would empower a plaintiff to shift the burden of proof to an educational institution to justify its academic decisions, without first requiring the plaintiff to prove the merits of his claim. Thus, in many cases, it would force such institutions to disclose and explain the constitutionally protected reasons for their actions based on minimal evidence that is insufficient to prove that the institutions acted unlawfully. Not only is this system constitutionally offensive; it is patently inconsistent with Title VII's plain text and this Court's interpretation of identical statutory terms. Given the strong statutory evidence that Congress never intended this impracticable regime, there is no compelling reason to adopt it.

II. The Plain Text Of Title VII's Retaliation Provision Requires Plaintiffs To Prove But-For Causation.

Congress wisely avoided the practical problems of a mixed-motive framework for retaliation claims under Title VII. Title VII's plain text prohibits decisions made "because" an employee opposed a discriminatory employment practice or participated in procedures related to a discrimination charge. Congress has not authorized a mixed-motive, burden-shifting framework under this provision, as it has under Title VII's discrimination provision. And this Court has interpreted materially indistinguishable language in another employment discrimination statute to require proof of but-for causation. The same reasoning clearly applies here.

1. The logic of this Court's decision in *Gross* squarely controls this case. In *Gross*, this Court interpreted statutory language in the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621–634, that "makes it unlawful for an employer to take adverse action against an employee '*because of* such individual's age.'" *Gross*, 557 U.S. at 170 (quoting 29 U.S.C. § 623(a)) (emphasis added). The Court held that "the ordinary meaning of the ADEA's requirement" requires that "a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision." *Id.* at 176.

This Court rejected the argument that the ADEA's statutory text should be interpreted to allow the mixed-motive proof permitted under Title VII's discrimination provision. Unlike the ADEA, Title VII's anti-discrimination protections "explicitly

authoriz[e] discrimination claims in which an improper consideration was 'a motivating factor' for an adverse employment decision." *Gross*, 557 U.S. at 174 (quoting 42 U.S.C. § 2000e-2(m)).[4] Thus, "Congress neglected to add" a mixed-motive "provision to the ADEA when it amended Title VII ..., even though it contemporaneously amended the ADEA in several ways." *Id.*

The statutory text at issue in *Gross* is materially indistinguishable from the text of Title VII's retaliation provision. In both statutes the crucial term is "because," and absent a clear congressional indication to the contrary, the same word used in multiple statutes must be given its same ordinary meaning. *See Hamilton v. Lanning*, 130 S. Ct. 2464, 2471–72 (2010). If anything, Congress has clearly indicated its intent *not* to permit mixed-motive retaliation claims under Title VII. The Civil Rights Act of 1991, Pub. L. No. 102-166, § 115, 105 Stat. 1071, 1079, amended Title VII's discrimination provision to authorize mixed-motive claims, but Congress declined to add language permitting such claims under Title VII's neighboring retaliation provision. "Where Congress includes particular language in one section of a statute but omits it in

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[4] The full text of Section 2000e-2(m) provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was *a motivating factor* for any employment practice, even though other factors also motivated the practice" (emphasis added). *See also* 42 U.S.C. § 2000e-5(g)(2)(B) (restricting the remedies available under Section 2000e-2(m)).

another section of the *same* Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quotation and alteration marks omitted) (emphasis added); *see also Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 61–63 (2006) (holding that the retaliation prohibited by Title VII is not limited to the terms, conditions, or status of employment because Title VII's retaliation provision does not contain the same limiting language as the statute's discrimination provision).

2. This Court's decision in *Price Waterhouse* is inapposite and outdated. *Price Waterhouse* adopted a mixed-motive, burden-shifting framework under Title VII's discrimination provision, holding that after a "plaintiff in a Title VII case proves that [protected status] played a *motivating part* in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken [the plaintiff's protected status] into account." 490 U.S. at 258 (emphasis added). The Civil Rights Act of 1991, adopted the *Price Waterhouse* interpretation in part, rejected it in part, and declined to apply the mixed-motive regime outside Title VII discrimination actions. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94–95 (2003).

Price Waterhouse did not address Title VII's retaliation provision. Nor does its logic apply to Title VII's retaliation provision. Both the plurality opinion and Justice O'Connor's concurring opinion focused on the specific intent behind the Act's discrimination

provision to justify their conclusions. *See* 490 U.S. at 243–45 (plurality opinion); *id.* at 262–63 (O'Connor, J., concurring in the judgment). The Court thus adopted the burden-shifting framework to facilitate the remedial goals of Title VII's core protection against discrimination. *See id.* at 239 (plurality); *id.* at 265 (O'Connor, J., concurring in the judgment). But the justifications for such a regime do not equally apply to Title VII's retaliation provision, which is "a prophylactic measure to guard the primary right" against discrimination. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 189 (2005) (Thomas, J., dissenting); *see also Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (Title VII's retaliation provision is aimed at "[m]aintaining unfettered access to statutory remedial mechanisms."). Indeed, this appears to be the policy judgment Congress made when it declined to extend the mixed-motive framework to retaliation claims.

To the extent *Price Waterhouse* would apply here, it should be overruled. *Gross* indicated that "it is far from clear that the Court would have the same approach were it to consider the question [in *Price Waterhouse*] today in the first instance." 557 U.S. at 178–79. And for good reason. *Price Waterhouse* either ignores or distorts the plain meaning of "because" to permit proof other than but-for causation. *See* 490 U.S. at 281 (Kennedy, J. dissenting). Indeed, "[t]he most confusing aspect of the [*Price Waterhouse*] plurality's analysis of causation and liability is its internal inconsistency." *Id.* at 285. And as *amici* explained above, it leads to grave practical problems. This Court's decision in *Gross* has clarified the confusion; that more recent

and more accurate understanding should apply with equal force here.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-484

IN THE

Supreme Court of the United States

UNIVERSITY OF TEXAS
SOUTHWESTERN MEDICAL CENTER,
Petitioner,

v.

NAIEL NASSAR,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE ET AL. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE* [1]

The American-Arab Anti-Discrimination Committee ("ADC") and the *amici curiae* joining this brief (incorporated by reference in Appendix A), are civil rights organizations that seek to preserve and defend the rights of those who face discriminatory retaliation in the workplace. The ADC, which was founded by U.S. Senator James Abourezk over 33 years ago in 1980, consists of members from all 50 states, and has multiple chapters nationwide. The ADC is non-sectarian and non-partisan, and is the largest Arab American grassroots civil rights organization in the U.S.[2] In this case, the rights of the ADC's constituents will be fundamentally affected by the Court's determination of which standard of proof is necessary

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[1] Pursuant to Supreme Court Rule 37, this brief is filed with the written consent of all parties. The parties' consent letters are on file with the Court. This brief has not been authored, either in whole or in part, by counsel for any party, and no person or entity, other than *amicus curiae* or their counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] Of 3.6 million Arab Americans, over 80% are U.S. citizens, and most are Christian. Arab Americans trace their roots to Arabic-speaking countries, especially Lebanon, Palestine, Syria, Egypt, Morocco, and Iraq. Arab American Institute Foundation, *Demographics* (2012), http://aai.3cdn.net/2b24e6a8711d521148_5ym6iv4b5.pdf. For purposes of this brief, reference to the term "Arab" relates to those protected under the classifications of "race" or "national origin" under Title VII. *See* Rachel Saloom, *I Know You Are, But What Am I? Arab-American Experiences Through the Critical Race Theory Lens*, 27 Hamline J. Pub. L. & Pol'y 55 (2005-2006) (discussion regarding the legal classification of "Arabs"). Of 2.75 million Muslim Americans, over 80% are U.S. citizens, and 41% are of Arab descent. Pew Research Center, *Muslim Americans: No Signs of Growth in Alienation or Support for Extremism* 14 (2011).

to establish a retaliation claim under Title VII of the Civil Rights Act of 1964: (1) the "mixed-motive" causation standard, which would preserve an important avenue of redress for employees who face adverse employment actions for expressing opposition to unlawful discrimination; or, instead, (2) the "but-for" causation standard, which in effect would allow employers to avoid liability easily for retaliating against employees. The ADC respectfully urges the Court to affirm the decision of the Fifth Circuit by holding that the "mixed-motive" standard applies to the anti-retaliation provision of Title VII.

The ADC's interest in this case arises from the Petitioner University of Texas Southwestern Medical Center's ("UTSMC") discriminatory retaliation against Respondent Dr. Naiel Nassar, an Arab and Muslim American of Egyptian descent. In his resignation letter to UTSMC, Dr. Nassar described his supervisor's conduct as "religious, racial, and cultural bias against Arabs and Muslims." *Nassar v. Univ. of Texas Sw. Med. Ctr.*, 674 F.3d 448, 451 (5th Cir. 2012), *cert. granted*, 133 S.Ct. 978 (2013). Thereafter, UTSMC took an adverse employment action against Dr. Nassar by causing its affiliated hospital, Parkland Hospital, to rescind its employment offer to Dr. Nassar. *Id.* at 452. The jury found that this action was based, at least in part, on retaliation against Dr. Nasser for his claim of bias asserted in his resignation letter. *Id.* Dr. Nassar's case is, unfortunately, one of many cases that the ADC is tracking as Arab and Muslim Americans increasingly find themselves subject to employment discrimination and retaliation.

Statistical data gathered by the Equal Employment Opportunity Commission ("EEOC"), which monitors

retaliation charges filed by those who self-identify as Arabs and Muslims, indicate that retaliation against these groups is on the rise.[3] Since the tragic events of September 11, 2001, the number of Arab and Muslim Americans who have complained of being retaliated against has risen sharply. Specifically, in 2012, almost 40% of Arab and 50% of Muslim Americans who filed discrimination charges also filed retaliation charges, whereas in 2000, only approximately 20% of Arab and Muslim Americans who filed discrimination charges also filed retaliation charges. Furthermore, since 9/11, Muslim Americans have filed more charges of retaliation and discrimination than any other religious group monitored by the EEOC.

SUMMARY OF ARGUMENT

Before and especially after 9/11, Arab and Muslim Americans have experienced pervasive discrimination, which has frequently played out in the workplace. *See generally* U.S. Dep't of Justice ("DOJ"), *Confronting Discrimination in the Post-9/11 Era: Challenges and Opportunities Ten Years Later* (October 19, 2011), http://www.justice.gov/crt/publications/post911/post911summit_report_2012-04.pdf ("*Confronting Discrimination*"). When Congress passed Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) *et seq.*, and later revised it under the Civil Rights Act of 1991, 42 U.S.C. § 1981a, Congress intended to eradicate discrimination and

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[3] Press Release, ADC, EEOC Statistical Data: Discrimination and Retaliation Charges Filed by Arab and Muslim Americans (Mar. 25, 2013). The EEOC provided the ADC with statistics reflecting the charges that Arabs and Muslims filed with the EEOC from 2000-2012, including charges filed with Fair Employment Practice Agencies ("FEPA"), state and local agencies acting on behalf of the EEOC. *Id.*

retaliation from the workplace for the benefit of groups such as Arab and Muslim Americans. *See Price Waterhouse v. Hopkins,* 490 U.S. 228, 240-44 (1989). Applying a "but-for" standard to the anti-retaliation provision of Title VII, however, would thwart congressional intent and allow employer-defendants to avoid liability easily, leaving employee-plaintiffs who should be protected by the provision – such as Dr. Nassar – without an effective avenue for redressing retaliation in the workplace.[4]

Part I.A of this brief explains that in the case below, the Fifth Circuit correctly held that the "mixed-motive" standard applies to Dr. Nassar's Title VII retaliation case. *Nassar*, 674 F.3d at 454 n. 16 (citing *Smith v. Xerox Corp.,* 602 F.3d 320, 330 (5th Cir. 2010)). In *Smith*, the Fifth Circuit properly distinguished *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), and held that the "but-for" standard is inapplicable to Title VII retaliation cases. The *Smith* court explained that *Gross* expressly recognized that Title VII and the Age Discrimination and Employment Act ("ADEA") were materially different with respect to their causation standards, and that *Gross* only applied the "but-for" causation standard to the ADEA. 602 F.3d at 329 (citing *Gross*, 557 U.S. at 173). The Fifth Circuit's approach in *Smith* honors this Court's repeated insistence that, under the Equal Protection Clause, courts should evaluate laws with race or national origin classif-

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[4] The anti-retaliation provision of Title VII prohibits an employer from taking an adverse employment action against an employee who engages in "protected conduct." 42 U.S.C. § 2000e-3(a). Employees engage in "protected conduct" when they oppose an unlawful employment practice, or participate in an investigation, proceeding, or hearing related to Title VII. *Id.*

ications with higher scrutiny than laws with age classifications. Unlike in the ADEA context, the Court and Congress have established a "mixed-motive" standard for Title VII disparate impact cases. By including an anti-retaliation provision under Title VII, Congress intended for employees to have both the right to a discrimination-free work environment and effective procedures for enforcing that right. Imposing the higher standard of "but-for" causation on retaliation claimants would be inconsistent with congressional intent, create undue confusion for triers of fact, and unfairly place retaliation claimants at a judicial disadvantage as compared to discrimination claimants.

Imposing a "but-for" standard without the opportunity for the employee to shift the burden of persuasion to the employer would require the employee to establish the absence of any other independently sufficient reason for the employer's retaliatory action. Part I.B argues that this standard would create a nearly insurmountable burden for plaintiffs because, in the employment context, an employer has many opportunities to create some independently sufficient reason for its adverse action, thereby insulating itself from liability. The ultimate impact of imposing a "but-for" standard would be a widespread chilling effect for those protected under Title VII. As a result, Arab and Muslim Americans would be discouraged from expressing opposition to illegal discrimination in the workplace. Instead, as discussed in Part I.C, a "mixed-motive" standard with burden-shifting would place opposing parties on an equal playing field and more accurately reveal the reason(s) for an employer's adverse decision.

As explained in Part II, and as demonstrated in this case, Arab and Muslim Americans are particularly susceptible to discrimination and retaliatory action from employers. The EEOC's statistical data show a surge in the last decade in the number of discrimination and retaliation charges filed by those who self-identify as Arab and Muslim.

Discrimination and retaliation in the workplace is an outgrowth of overarching prejudice against Arab and Muslim Americans, who are negatively stereotyped and collectively blamed for the wrongful and unjustified acts of a few. Especially in the post-9/11 era, Arab and Muslim Americans (and those perceived as such) have suffered an unprecedented number of hate crimes, and incidents of harassment and violence. These realities provide all the more reason for the Court to establish a "mixed-motive" standard that adequately protects victims of discriminatory retaliation in the employment context.

ARGUMENT

I. THE COURT SHOULD APPLY A "MIXED-MOTIVE" STANDARD TO TITLE VII RETALIATION CASES.

Gross is inapplicable to this case. In *Gross*, the Court held in a 5-4 decision that, under the ADEA, a plaintiff is required to prove "but-for" causation without the opportunity to shift the burden of persuasion to the employer. 557 U.S. at 170. The Court should not extend *Gross* to this case because: (1) ADEA precedent does not apply to Title VII; (2) courts evaluate laws with race or national origin classifications under higher scrutiny than laws with age classifications; (3) a "but-for" standard would create unnecessary confusion for a trier of fact; and

(4) a "but-for" standard would be inconsistent with Congress's intent for Title VII to eradicate discrimination from the workplace. Additionally, imposing a "but-for" standard in retaliation cases would allow defendant-employers to avoid liability easily by providing an independently sufficient reason for their adverse decisions, which would be particularly unfavorable to Arab and Muslim Americans. Instead, a "mixed-motive" causation standard with burden-shifting would place the parties on a fair legal and procedural playing field, and would be a more accurate way to discover the reason(s) for an employer's adverse action.

A. The Court should not extend its holding in *Gross* to this case.

In this case, Dr. Nassar's claim arose under Title VII – albeit in the retaliation context – making the Court's precedent under the ADEA irrelevant. *Gross*, 557 U.S. at 173-75 (expressly limiting the Court's ruling to the ADEA context and emphasizing that Title VII and the ADEA are distinct statutory schemes). Rather, the clear precedent of Title VII is applicable. "Title VII [in contrast to the ADEA] meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations." *Price Waterhouse*, 490 U.S. at 241.

1. ADEA precedent does not apply to Title VII.

In *Price Waterhouse*, the Court interpreted the phrase "because of" in Title VII to mean that if the claimant could show that his or her protected status (race, color, sex, national origin, or religion) played a "motivating part" in the adverse employment

decision, then the burden of persuasion would shift to the defendant – thus requiring only proof of "mixed-motive" to shift the burden. *Id.* at 248-50. The *Price Waterhouse* Court determined that a defendant could meet its burden and avoid liability altogether by proving that it would have made the same decision even if it had not considered the prohibited factor ("same-decision defense"). *Id.* at 242. Two years after *Price Waterhouse*, in amending Title VII, Congress (a) rejected the same-decision defense by changing it from a complete bar to recovery to a limitation on the damages that plaintiffs could recover,[5] and (b) approved the "mixed-motive" standard by writing it into the anti-discrimination provision of Title VII. *See* 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(B). Significantly, Congress disapproved of the same-decision defense because to do otherwise would send "a message that a little overt sexism or racism is okay, as long as it was not the only basis for the employer's action." H.R. Rep. No. 102-40, pt. 1, at 47 (1991). This principle should apply with equal force to retaliation cases – it is inappropriate for an employer to partially base its decision-making on consideration of an employee's protected conduct.

In 2009, *Gross* held that although, like Title VII, the ADEA uses the phrase "because of" to prohibit age discrimination, a "mixed-motive" framework is never applicable in ADEA disparate treatment cases.

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[5] The remedies excluded by a successful same-decision defense are "damages" or "admission, reinstatement, hiring, promotion, or payment" of back wages. 42 U.S.C. § 2000e-5(g)(2)(B)(ii). The relief that may be granted regardless of any successful same-decision defense include "declaratory relief, injunctive relief [that is not otherwise excluded], and attorney's fees and costs." 42 U.S.C. § 2000e-5(g)(2)(B)(i).

557 U.S. at 175. The Court reasoned that when Congress amended Title VII in 1991, codifying the *Price Waterhouse* "mixed-motive" definition of "because of," Congress did not amend the ADEA in the same way, thereby intentionally omitting "mixed-motive" causation in age discrimination cases. *Id.* at 174-75. The holding in *Gross* has led to divergent views among circuit courts of appeals regarding the breadth of its applicability.[6]

The Fifth Circuit correctly held in *Smith* that *Gross* did not apply to Title VII, and as such, the district court's mixed-motive jury instruction was proper in a Title VII retaliation case. 602 F.3d at 330. The *Smith* court explained that the *Gross* Court's reasoning was based on the text of the ADEA and a comparison of Congress's approach to Title VII and the ADEA. *Id.* at 328. *Smith* expressly relied on the *Gross* Court's conclusion that Congress did not authorize "mixed-motive" claims under the ADEA. *Id.* The *Smith* court cogently explained, however, that the application of *Gross* to Title VII retaliation cases would be an "incorrect," "simplified application of *Gross*." *Id.* *Gross* expressly recognized that Title VII and the ADEA are "materially different with respect to the relevant burden of persuasion," and as such, Title VII precedent did not control cases under ADEA. *Id.* at 329-30 (citing *Gross*, 557 U.S. at 173).

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[6] *Compare Smith*, 602 F.3d at 329-30 (holding that *Gross* does not apply to Title VII retaliation cases because *Gross* expressly recognized that Title VII and the ADEA are materially different with respect to their burden of causation), *with Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 961-62 (7th Cir. 2010) (finding that *Gross* mandates that unless an anti-discrimination statute has language that expressly recognizes mixed-motive claims, the words "because of" demand proof that a forbidden consideration was the "but for" cause of the adverse action).

By the same token, it follows that the Court's interpretation of Title VII in this case should not be governed by ADEA precedent.

2. Courts evaluate laws with race or national origin classifications under higher scrutiny than laws with age classifications.

It is a well-established principle of Constitutional law that, under the Equal Protection Clause, laws with race and national origin classifications are subjected to stricter scrutiny than laws with age classifications. *Compare Loving v. Virginia*, 388 U.S. 1, 11 (1967) (racial classifications are "subjected to the most rigid scrutiny") (internal quotation omitted); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (national origin classifications are subject to strict scrutiny) *with Vance v. Bradley*, 440 U.S. 93, 97 (1979) (citing *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14 (1976) (courts evaluate laws with age classifications by determining whether they are "rationally related to furthering a legitimate state interest."). The Court has explained that plaintiffs who face racial or national origin discrimination are entitled to more protection due to the historical discriminatory treatment they have endured – and as explained in Part II, Arab and Muslim Americans are the quintessential example of such a group. In *Massachusetts Bd. of Retirement v. Murgia*, the Court explained that "[w]hile the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics

not truly indicative of their abilities." 427 U.S. at 313. Unlike one's race or national origin, old age "does not define a discrete and insular minority." *Id.* at 313-314. *See also Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000) (citing *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440, (1985)). So, here, applying a "mixed-motive" causation standard that is more protective of a plaintiff's ability to seek redress for race-based and national origin-based discrimination than the "but-for" standard is fully consistent with the greater protection provided in the Equal Protection context.

3. A "but-for" standard would create unnecessary confusion for a trier of fact.

Imposing a "but-for" standard to the anti-retaliation provision of Title VII would create undue confusion for a trier of fact because of the interconnectedness of the anti-retaliation and anti-discrimination provisions of Title VII. Both Congress and the Court have set forth a "mixed-motive" standard under the anti-discrimination provision of Title VII. *Price Waterhouse*, 490 U.S. at 251-52; Civil Rights Act of 1964, § 701 *et seq.*, *as amended*, 42 U.S.C. § 2000e *et seq*. By including an anti-retaliation provision under Title VII, Congress intended employees to have both the right to a discrimination-free work environment and effective procedures for the enforcement of that right. Requiring a different standard of proof for the anti-discrimination provision of Title VII and the statutory mechanism intended to protect it would create excessive confusion. *See Costa v. Desert Palace, Inc.*, 299 F.3d 838, 851 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (2003) (noting that "[t]he 1991 Act eliminated any confusion about burden-shifting and the proof

necessary for a Title VII violation); *see also Price Waterhouse*, 490 at 287 (Kennedy, J., dissenting) (highlighting the disadvantageous "risk that the trier of fact will misapprehend the controlling legal principles and reach an incorrect decision."). Indeed, the Court has recognized that the purpose of the anti-retaliation provision in Title VII is to allow "unfettered access to statutory remedial mechanisms." *Robinson v. Shell Oil Company*, 519 U.S. 337, 346 (1997). Therefore, this Court should not require a higher burden for a Title VII retaliation claim than a Title VII discrimination claim when the two types of claims "do not pose different consideration[s] for causation." Michael C. Harper, *The Causation Standard in Federal Employment Law: Gross v. FBL Financial Services, Inc., and the Unfulfilled Promise of the Civil Rights Act of 1991*, 58 Buff. L. Rev. 69, 137 (2010).

4. A "but-for" standard would be inconsistent with Congress's intent for Title VII to eradicate discrimination from the workplace.

There is a fundamental disconnect in the concept that Congress would have intended an employee to defend his right to be free from discriminatory retaliation under a more stringent standard than the right to be free from discrimination itself. Indeed, in passing the Civil Rights Act of 1991, Congress reiterated the idea that Title VII seeks to prohibit "mixed-motive" discrimination. *See* H.R. Rep. No. 102-40, pt. 1, at 48 (1991) (explaining that the standard is whether the protected status category "actually contributed or was otherwise a factor in an employment decision."); *id.* pt. 2, at 18 ("[T]he complaining party must demonstrate that discrim-

ination was a contributing factor in the employment decision—i.e., that discrimination actually contributed to the employer's decision with respect to the complaining party."). The legislative history of the initial enactment of Title VII in 1964 underscores how incongruous it would be to require "but-for" causation under any provision of Title VII. In response to Senator McClellan's proposal to define Title VII violations as occurring only when a prohibited factor was the sole motivation for an adverse employment action, Senator Case stated: "If anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of." 110 Cong. Rec. 13837-38 (1964); *see also* 110 Cong. Rec. 7218 (1964) (statement by Senator Clark that "[t]he bill simply eliminates consideration of color [or other forbidden criteria] from the decision.").

B. Imposing a "but-for" standard in retaliation cases would allow defendant-employers to avoid liability easily.

A "but-for" standard without burden-shifting would allow employers to avoid liability, so long as the plaintiff could not disprove that the defendant had some independently sufficient alternative reason for its decision – even if the employer admits that it also considered the employee's protected conduct. In the employment context, however, an employer typically has multiple reasons for making an adverse decision. *See Price Waterhouse*, 490 U.S. at 268-69 (O'Connor, J., concurring). Also, very few (if any) employees have unblemished employment records. *See id.* at 273-74. As a result, employers would effectively have permission to consider an employee's protected conduct in their decision-making with impunity, so long

as the employee could not disprove an independently sufficient reason for the employer's adverse action.

Escalating the plaintiff's burden to a "but-for" standard in retaliation cases would create a chilling effect. Claimants such as Arab and Muslim Americans would face prohibitive difficulty in proving their claims. Their unlikelihood of success on a retaliation claim would create an additional incentive to acquiesce to discrimination in the workplace, silencing vulnerable groups of employees from seeking redress for workplace discrimination.

Hocine Omari, an Arab and Muslim of Algerian descent who alleged Title VII retaliation against his employer, provides a clear example of a potential plaintiff whose valid retaliation claim could fail under a "but-for" standard. *Omari v. Waste Gas Fabricating Co. Inc.*, No. Civ.A. 04-796, 2005 WL 545294, at *15 (E.D. Pa. Mar. 4, 2005) (finding that retaliatory animus was a "substantial motivating factor" for the adverse employment action). Omari testified that after 9/11, his co-workers began harassing him by nicknaming him "Osama," calling him a terrorist, hijacker, cave-dweller, camel driver, and wetback, and frequently cursing at him. *Id.* at *1. Omari's co-workers told him he was probably making a bomb, and asked if Omari knew how to fly a plane into a building. *Id.* at *1-2. On multiple occasions, Omari engaged in protected conduct under the anti-retaliation provision of Title VII by reporting his co-workers' behavior to his supervisors, who told Omari the harassment would stop. *Id.* at *4, *13. The harassment did not stop, however, and Omari learned that his supervisors did not inform higher management of his claims. *Id.* Omari filed a complaint with the EEOC. When Omari's supervisor

learned about the complaint, he said that Omari was "making a problem" and that Omari would be fired the next time he made a mistake. *Id.* at *6. Subsequently, Omari made a mistake on his timecard. *Id.* at *8. Seizing the opportunity, Omari's employer fired him for "timecard fraud." *Id.* Under a "but-for" standard without burden-shifting, Omari's employer could have completely avoided liability if Omari could not disprove that "time-card fraud" was an independently sufficient reason for its decision. Despite the overt retaliatory action of his employer, Omari's retaliation claim would likely not have survived. However, under the "mixed-motive" standard that the district court applied, the employer was unable to avoid liability because Omari could show that his protected conduct played a motivating part in his employer's adverse decision.

Awad v. National City Bank, No. 1:09-CV-00261, 2010 WL 1524411, at *16-18 (N.D. Oh. Apr. 15, 2010) (denying the defendant's motion for summary judgment on Awad's retaliation claim) provides another compelling example. Rami Awad engaged in protected conduct by filing a complaint with the EEOC stating that his employer, a bank, would not promote him because he was a Muslim and Arab of Palestinian descent. *Id.* at *1. Before a scheduled mediation, Awad's supervisor threatened to fire Awad if he did not drop the EEOC charge. In response, Awad settled the EEOC charge. However, when Awad refused to drop the case entirely, his supervisor subjected Awad to significant harassment and frequently yelled at him. *Id.* at *3-4. Ultimately, the bank fired Awad, claiming that it was for "performance reasons" (mistakes in loan applications). *Id.* That the rationale employed in the Awad case could defeat a retaliation claim under a "but-for" analysis under-

scores the real world consequences for Arab and Muslim Americans and other groups protected by Title VII. Under a "but-for" standard, if a claimant is unable to disprove that "performance reasons" were independently sufficient for an employer's decision, then almost no employee would stand a chance in proving a retaliation claim. As Justice O'Connor explained in *Price Waterhouse*, Title VII would be incapable of eliminating discrimination if plaintiffs must "pinpoint discrimination as the precise cause of [their] injury, despite having shown that it played a significant role in the decisional process." *See* 490 U.S. at 273 (O'Connor, J., concurring). A "mixed-motive" standard, by contrast, does not unfairly prejudice those who have faced adverse employment actions due in part to expressing opposition to discriminatory conduct.

The policy goals of Title VII include "deterring employers from discriminatory conduct and redressing the injuries suffered by victims of discrimination." H.R. Rep. No. 102-40, pt. 2, at 13. Title VII also was designed to punish employers who participate in illegal retaliation or discrimination. *Price Waterhouse*, 490 U.S. at 265 (O'Connor, J., concurring) ("[T]here is no doubt that Congress considered reliance on gender [national origin, religion,] or race in making employment decisions an evil in itself."). Imposing a "but-for" causation requirement for retaliation claims would jeopardize these goals and create a standard that allows discriminators to avoid liability easily. If employers who consider protected conduct as a factor in their decision-making can easily avoid liability, employers will not be deterred from the very conduct that Congress enacted Title VII to prevent.

C. Burden-shifting in retaliation cases allows the fact-finder to fairly and accurately discover the reason(s) for an employer's adverse decision.

A "but-for" standard of causation in retaliation cases with no possibility of burden-shifting places a daunting one-sided burden on the claimant to prove a negative: the absence of any other independently sufficient cause for an adverse employment decision. *See* Martin J. Katz, *Gross Disunity,* 114 Penn St. L. Rev. 857, 882 (2010); David Sherwyn & Michael Heise, *The Gross Beast of Burden of Proof: Experimental Evidence on how the Burden of Proof Influences Employment Discrimination Case Outcomes*, 42 Ariz. St. L.J. 901, 937 (2010). This requirement fails to recognize something obvious – the most relevant information and evidence tends to be under the employer's control. Furthermore, the employer is the alleged wrongdoer, and as such, should bear the burden of untangling its permissible from its impermissible motives. *See NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 403 (1983) (concluding that as the alleged wrongdoer, the employer should bear the risk that it will be unable to untangle its permissible from its impermissible motives).

A "mixed-motive," burden-shifting standard allows the fact finder to uncover and assess the factual heart of the parties' allegations and defenses. *See Price Waterhouse*, 490 U.S. at 261-62 (1989) (O'Connor, J., concurring) (explaining that burden-shifting is apt "in cases . . . where the employer has created uncertainty as to causation by knowingly giving substantial weight to an impermissible criterion."). The burden does not fall on the employer until the claimant proves that his or her protected conduct played a

motivating part in the employer's decision-making. If the claimant is able to shift the burden, the employer, which controls the evidence about potential non-discriminatory justifications, may dispel the plaintiff's allegation by providing evidence of some other reason for its action. *Id.* at 277 ("This evidentiary scheme essentially requires the employer to place the employee in the same position he or she would have occupied absent discrimination.").

As illustrated in *Arafi v. Mandarin Oriental,* burden-shifting is a fair and accurate process for determining the root cause(s) of an employer's potentially retaliatory decision. 867 F.Supp. 2d 66 (D.D.C. 2012) (denying the defendant's motion to dismiss Arafi's retaliation claim). Mohamed Arafi, a Muslim and Arab of Moroccan descent who worked for the defendant hotel, engaged in protected conduct under the anti-retaliation provision when he complained twice to his supervisor after he was prohibited from working near an Israeli delegation. *Id.* at 66. His direct manager responded, "You know how the Israelis are with Arabs and Muslims." *Id.* at 68. Another supervisor told Arafi to be "cognizant of the hostility that Israelis have towards Arabs and Muslims." *Id.* at 76. Subsequently, Arafi's schedule was significantly reduced from five to seven days per week to one day per month. *Id.* at 75. The employer's purported reason was that the Department of State conducted a background check of employees in anticipation of the arrival of the delegation that returned "irregularities" with regard to Arafi. *Id.* at 69. On these facts, without burden-shifting, Arafi would have the sole burden of demonstrating a lack of "irregularities," and the employer would never have the burden of persuasion to justify its adverse decision to restrict Arafi's work schedule.

Such a process would improperly burden the claimant because the employer took the adverse action, and would be best suited to provide precise information and evidence about its decision. In fact, because the district court permitted Arafi to shift the burden to his employer, the fact finder was able to consider the fact that Arafi's employer did not know and could not explain what the "irregularities" entailed. *Id.* Without burden-shifting, Arafi's ability to disprove alleged "irregularities" about his background would be difficult, inefficient, and provide less accuracy than a framework that allowed for burden-shifting. *See Price Waterhouse*, 490 U.S. at 253; Harper, *supra*, at 140-44; Katz, *supra*, at 655-58.

A single "mixed-motive" standard that allows for burden-shifting for all Title VII claims would help instill public confidence in anti-discrimination laws. Because the goal of employment discrimination law is to put people similarly situated on an equal playing field, then the public may not understand why one provision under Title VII should have a more favorable proof structure than another provision. Mark R. Deethardt, *Life after Gross: Creating a New Center for Disparate Treatment Proof Structures*, 72 La. L. Rev. 178, 219-20 (2011). One "mixed-motive" structure for both disparate impact and retaliation claims under Title VII would make the law easier to understand for employers, employees, lawyers, judges, and juries. William R. Corbett, *Babbling About Employment Discrimination Law: Does the Master Builder Understand the Blueprint for the Great Tower?*, 12 U. Pa. J. Bus. L. 683, 691 (2010).

II. A "BUT-FOR" STANDARD WOULD DISPROPORTIONATELY AFFECT ARAB AND MUSLIM AMERICANS WHO FACE HIGH LEVELS OF DISCRIMINATION AND RETALIATION INSIDE AND OUTSIDE OF THE WORKPLACE.

Since 9/11, Arab and Muslim Americans have been subjected to unparalleled workplace discrimination and retaliation. Muslims have filed more charges alleging religious retaliation and discrimination than any other religious group that the EEOC monitors – including Catholics, Jews, Protestants, Sikhs, and Seventh Day Adventists. Press Release, ADC, EEOC Statistical Data. Additionally, it is particularly important to erect effective remedies for workplace retaliation because of the discrimination that Arab and Muslim Americans face at large.

A. In the workplace, Arab and Muslim Americans have faced a surge in discrimination in the form of retaliation.

"Harmful racial stereotyping of Arabs and Muslims in the media and popular culture . . . contributes to tangible discrimination in the workplace." Sahar Aziz, *Arab and Muslim American Civil Rights and Identity: A Selection of Scholarly Writings from the Decade after 9/11* 52 (2011). Arab and Muslim Americans have suffered discrimination at work for decades. For example, in 1993, an Arab American Muslim New York transit police officer committed suicide after enduring continuous taunting by his coworkers. Jack G. Shaheen, *Arab and Muslim Stereotyping in American Popular Culture* 33 (1997). After 9/11, employment retaliation and discrimination

against Arab and Muslim Americans increased.[7] *See, e.g., El-Din v. New York City Admin.*, 2012 U.S. Dist. LEXIS 126136, at *1 (S.D.N.Y. Sept. 5, 2012) (before 9/11, the Egyptian Muslim plaintiff was called a "terrorist," and post-9/11 was constantly labeled a "Muslim terrorist"). On September 14, 2001, the EEOC issued a Special Alert urging employers to be particularly attentive to "instances of harassment or intimidation against Arab-American and Muslim employees." Press Release, EEOC, EEOC Chair Urges Workplace Tolerance in Wake of Terrorist Attack (Sept. 14, 2001). By 2010, 25% of the complaints that the ADC received related to employment discrimination. ADC, *The 2010 ADC Legal Report: Legal Advocacy and Policy Review* 2 (2011); *see also Report on Hate Crimes and Discrimination Against Arab-Americans 2003-2007* 34 (Hussein Ibish, ed.) (2008) (from 2003-2007, the ADC received approximately ten reports per week of employment discrimination of one kind or another).

Statistical data reveal a troubling trend of retaliation and discrimination against Arab and Muslim Americans in the workplace. Press Release, ADC, EEOC Statistical Data. According to EEOC statistics, the amount of Title VII retaliation and discrimination charges spiked after 9/11 for those who self-

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[7] For example, a 2003 survey conducted by the New York City Commission on Human Rights regarding post-9/11 discrimination revealed that 26% of the incidents reported by respondents were related to employment discrimination. New York City Commission on Human Rights, *Discrimination Against Muslims, Arabs and South Asians in New York City Since 9/11* (2003). 81% percent of respondents were Muslim and 47% were Arab. *Id.*

identify as (1) "Arab, Afghani, or Middle Eastern" and (2) "Muslim." *Id.*

With regard to the first category, from 2000-2001, the EEOC received only 13 charges of retaliation, and 34 charges of discrimination. *Id.* After 9/11, however, the "Arab, Afghani, or Middle Eastern" group reported record levels of retaliation and discrimination.[8] In 2002 alone, this group filed 208 retaliation and 950 discrimination charges. This represents a nearly 16 fold increase in retaliation and a 28 fold increase in discrimination charges from the years before. While these numbers decreased slightly from 2003-2006,[9] they surged again from 2007-2011.[10] In 2012, the EEOC received 298 retaliation and 787 discrimination charges from this group. *Id.*

For Muslims, there was a similar spike in post-9/11 charges of retaliation and discrimination. *Id.* In 2000 and 2001, those who self-identified as "Muslim" filed 65 retaliation and 284 discrimination charges, and 91 retaliation and 329 discrimination charges,

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[8] Recognizing post-9/11 intolerance of Arab, Afghani, Middle Eastern, Muslim and South Asian Americans, the EEOC began to monitor 9/11 backlash discrimination, terming it "Process Type Z." According to the EEOC, between September 11, 2001 and December 11, 2002, at least 705 charges were filed against employers under Process Type Z. Press Release, EEOC, EEOC Sees Rise in Discrimination Against Arab-Americans and Muslims (Jan. 22, 2003).

[9] 2003: 223 retaliation/890 discrimination; 2004: 209 retaliation/745 discrimination; 2005: 195 retaliation/717 discrimination; 2006: 182 retaliation/636 discrimination. Press Release, ADC, EEOC Statistical Data.

[10] 2007: 222 retaliation/715 discrimination; 2008: 268 retaliation/783 discrimination; 2009: 378 retaliation/978 discrimination; 2010: 339 retaliation/862 discrimination; and 2011: 390 retaliation/915 discrimination. *Id.*

respectively. *Id.* Then, in 2002, this group filed 273 retaliation and 1,160 discrimination charges – over three times the number of retaliation and discrimination charges from the previous year. *Id.* From 2003-2008, the EEOC received slightly fewer retaliation and discrimination charges,[11] but the number rose again from 2009-2011.[12] In 2012, the EEOC received 390 retaliation and 780 discrimination charges from this group. *Id.*

The Court should consider the upward trend in the proportion and raw number of retaliation charges that Arab and Muslim Americans have filed with the EEOC. The anti-retaliation provision of Title VII provides redress for those who have been punished for expressing dissent to discriminatory conduct. Imposing a "but-for" standard would weaken this provision, and effectively eliminate a restraint on employers' ability to discriminate.

B. Retaliation in the workplace is an outgrowth of broad discrimination against Arab and Muslim Americans.

Dr. Nassar's case provides an illustration of general discrimination against Arab and Muslim Americans in society percolating into the workplace. Dr. Nassar's supervisor, for example, made the stereotypical and insulting statement that "Middle

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[11] 2003: 234 retaliation/949 discrimination; 2004: 214 retaliation/799 discrimination; 2005: 233 retaliation/767 discrimination; 2006: 234 retaliation/825 discrimination; 2007: 228 retaliation/601 discrimination; and 2008: 217 retaliation/666 discrimination. *Id.*

[12] 2009: 340 retaliation/803 discrimination; 2010: 380 retaliation/792 discrimination; and 2011: 433 retaliation/879 discrimination. *Id.*

Easterners are lazy." *Nassar*, 674 F.3d at 450. Negative stereotypes of Arabs and Muslims have pervaded American society, and, especially after 9/11, the number of Arab and Muslim Americans at the receiving end of hate crimes, harassment, and violence has been on the rise. *See, e.g., Confronting Discrimination*, at 2-3.

Stereotypes of Arabs and Muslims are almost exclusively negative.[13] *See* Edward W. Said, *Orientalism* 31-49 (1979) (explaining the historic understanding of Arabs to be racially inferior and culturally backwards). Most American schools either omit any study about Arabs and Muslims or include information that serves only to perpetuate existing negative stereotypes. ADC Education Dep't, *Reaching the Teachers Campaign*, http://www.adc.org/education/reaching-the-teachers-campaign. Mainstream media outlets tend to attribute the wrongful acts of some Arabs and Muslims to all of them. For example, the media prematurely blamed the 1996 crash of TWA Flight 800 on Arabs, Iranians, Muslims, and Middle Easterners. Shaheen, at 44. [14]

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[13] According to the Pew Research Center, "[a] significant minority (21%) of Muslim Americans say there is a great deal (6%) or a fair amount (15%) of support for extremism in the Muslim American community. That is far below the proportion of the general public that sees at least a fair amount of support for extremism among U.S. Muslims (40%). And while about a quarter of the public (24%) thinks that Muslim support for extremism is increasing, just 4% of Muslims agree." Pew Research Center, *supra* fn. 2.

[14] The National Transportation Safety Board eventually concluded that the probable cause of the accident was an equipment malfunction, Nat'l Transp. Safety Bd., In-flight Breakup over the Atlantic Ocean Trans World Airlines Flight 800, NTSB/AAR-00/03 (2000).

Arab and Muslim Americans are often the target of hateful public rhetoric. For example, on July 13, 2012, Congresswoman Michele Bachmann and four other members of the House of Representatives falsely and baselessly accused State Department Deputy Chief of Staff Huma Abedin, who is Arab American, of having links to the Muslim Brotherhood. In June 2011, congressional candidate Gabriela Saucedo Mercer claimed that Middle Easterners' "only goal is to cast harm to the United States." On December 7, 2011, Newt Gingrich, during his failed bid for the presidency, claimed that Palestinians were "an invented people." *Time Change – Hate Crimes and the Threat of Domestic Extremism: Hearing Before the Subcomm. on the Constitution, Civil Rights and Human Rights on the Judiciary of the S. Comm on the Judiciary*, 112th Cong. 4 (2012) (statement of the ADC). Negative portrayals of Arab and Muslim Americans send a powerful message: Arab and Muslim Americans are not to be trusted.

In the last decade, Arab and Muslim Americans (and those perceived as such) have been subjected to hate crimes, harassment, and violence. In the days following 9/11, the upsurge of violent attacks against them raised a national concern. *See, e.g., Texas Man Executed for Race-Related Killings*, N.Y. Times, July 20, 2011, at A17 (on September 14, 2001 three Muslim Pakistani-American convenience store employees in Texas were shot, one of whom died). In a Federal Bureau of Investigation ("FBI") report released in the aftermath of the 9/11 attacks, the FBI reported that hate crimes against Muslim Americans soared from 28 incidents in 2000 to 481 incidents in 2001, the most drastic climb among any group the

FBI has witnessed.[15] Within a year after 9/11, the ADC and the Coalition on American-Islamic Relations ("CAIR") recorded more than 200 incidents of physical violence, threats, and harassment against Arab and Muslim American students. *Report on Hate Crimes and Discrimination Against Arab-Americans: The Post September 11 Backlash* 7 (Hussein Ibish, ed.) (2003). In the first few years following 9/11, the DOJ investigated more than 800 incidents, including arson, physical threats and assaults, and murder against Arab and Muslim Americans. *Confronting Discrimination.*

Reports suggest that these incidents have intensified.[16] These stories paint a disturbing picture of the

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[15] In 2001, there were 481 incidents made up of 546 offenses having 554 victims of crimes motivated by bias against Muslims. FBI Uniform Crime Reporting (UCR) Program, *Hate Crime Statistics 2001*, 9 (2002), http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2001/hatecrime01.pdf. Of all religious bias incidents reported to the FBI in 2011, 13.3% pertained to anti-Islamic incidents. FBI Uniform Crime Reporting (UCR) Program, *Hate Crime Statistics 2011*, 2 (Dec. 2012), http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2011/narratives/incidentsandoffenses_final.pdf. While this figure represents a slight increase from 2010, it is a marked increase from the 2% reported in 2000. *Compare* FBI Uniform Crime Reporting (UCR) Program, *Hate Crime Statistics 2010*, 2 (Nov. 2011), http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010/narratives/hate-crime-2010-incidents-and-offenses.pdf, *with* FBI Uniform Crime Reporting (UCR) Program, *Hate Crime Statistics 2000*, 7 (2001), (http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2000/hatecrime00.pdf.

[16] The DOJ recently reported that hate crimes motivated by religious bias more than doubled between 2003-2006 and 2007-2011, increasing from 10% to 21%. Lynn Langton, Michael Planty, & Nathan Sandholtz, *Hate Crime Victimization, 2003-2011*, DOJ Bureau of Justice Statistics, 1 (Mar. 21, 2013). As a

harassment and danger that Arab and Muslim Americans endure daily. For example, on August 31, 2009, two men in California repeatedly hit a taxi driver in the back of the head while calling him a "terrorist" and "Taliban" member. *CAIR Seeks Hate Crime Charges in Assault on Calif. Taxi Driver*, CAIR California (Sept. 1, 2009), http://ca.cair.com/sfba/news/cair_seeks_hate_crime_charges_in_assault_on_calif._taxi_driver. On August 10, 2011, a Somali man was assaulted while his assailant yelled racially derogatory profanities. Press Release, DOJ, Former TSA Employee Pleads Guilty to Federal Hate Crime for Assaulting Elderly Somali Man (Aug. 10, 2011).

The undue discrimination that Arab and Muslim Americans face overall, as discussed in Part II.A, is not disconnected from retaliation and discrimination in the workplace. Rather, the evidence suggests that such attitudes permeate the workplace and make Arab and Muslim Americans particularly susceptible to discrimination and retaliation. A "mixed-motive" standard would give force to the anti-retaliation provision of Title VII, and would recognize both the post-9/11 backlash faced by Arab and Muslim Americans and the unfortunate possibility that the unpredictable future may find other communities in a similar situation.

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percentage of total violent crime, violent hate crime was also greater in 2007-2011 than in 2003-2006. *Id.* at 3.

CONCLUSION

For the foregoing reasons, the ADC respectfully urges the Court to AFFIRM the decision of the Fifth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

List and description of *amici curiae*:

Arab American Institute. The Arab American Institute ("AAI") is a non-profit, non-partisan national leadership organization founded in 1985. AAI was created to nurture and encourage the direct participation of Americans of Arab descent in the political and civil life of the United States. AAI's domestic policy priorities include the protection of civil rights, the preservation of civil liberties, and the termination of discrimination and profiling based on race, ethnicity, or religion. The question before the Court is directly related to AAI's mission and work in representing the interests of Arab Americans and its ongoing efforts to combat discrimination.

Asian American Legal Defense and Education Fund. The Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. AALDEF seeks sufficient protection for retaliation claimants.

Center for Constitutional Rights. The Center for Constitutional Rights ("CCR") is a national non-profit legal, educational, and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international law. The issues addressed in this case are directly related to CCR's work in the areas of employment discrimination generally and the discriminatory treatment of Arab and Muslim Americans, specifically. CCR has historically represented workers

in major employment discrimination cases based on religion, including the Sikh Metropolitan Transit Authority employees. CCR currently represents the Vulcans Society, a membership organization of African American firefighters, as well as African American and Latino New York City teachers in Title VII litigation. In addition, CCR has represented numerous Arabs and Muslims facing discrimination in the post 9/11 era.

Council on American-Islamic Relations. The Council on American-Islamic Relations ("CAIR") is a national organization working to combat discrimination and promote inclusion, particularly on behalf of Muslim Americans. The issues in this case are directly related to CAIR's work combating employment discrimination and retaliation.

Muslim Advocates. Muslim Advocates is a national legal advocacy and community education organization that works on the frontlines of civil rights to guarantee freedom and justice for Americans of all faiths. The issues at stake in this case directly relate to Muslim Advocates' work in fighting discrimination.

Sikh Coalition. The Sikh Coalition is a national community-based civil rights organization that works to combat discrimination, including workplace discrimination, against Sikh-Americans. Since 9/11, Sikhs have been subjected to increasing forms of violence and discrimination because of their actual or perceived race, ethnicity, national origin, and religion. Devout Sikhs, the majority of whom are from the Punjab region of South Asia, are distinguished by visible religious articles, including turbans and unshorn hair, and continue to experience harassment, discrimination, segregation, and retaliation in

the workplace. The issues in this case are directly related to the Sikh Coalition's work to combat discrimination against Sikhs, promote inclusion, and strengthen employment discrimination laws to better protect workers nationwide.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-484

In the Supreme Court of the United States

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER,

Petitioner,

v.

NAIEL NASSAR, M.D.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE RETAIL LITIGATION CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation, representing approximately 300,000 direct members and an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing amicus briefs in cases involving issues of vital concern to the nation's business community. It often files amicus briefs in cases pending before the Supreme Court, and has filed amicus briefs in cases directly relevant to the question presented by this case, such as *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), and *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

The Retail Litigation Center, Inc. (RLC) is a public policy organization that identifies and engages in legal proceedings which affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of workers throughout the United States, provide goods and services to tens of millions of additional people, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry

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[1] No counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *Amici*, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner and respondent have provided written consent to the filing of this amicus brief.

perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases.

Amici's members are employers that are regulated by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and other employment statutes that may be affected by this decision. They are potential defendants in retaliation suits like the one at issue in this case and thus have a strong interest in the proper resolution of this case. As discussed below, holding that an employer may be held liable for improperly considering one factor among many in a highly subjective employment decision would have significant negative impacts on how employers conduct business.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question whether Title VII's anti-retaliation provision and similarly worded statutes require a plaintiff to prove but-for causation, or merely that an improper consideration is one among multiple motivating factors for an employer's decision. The Court's decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), paves the answer to that question: a plaintiff must prove but-for causation. The same considerations on which this Court based its decision in *Gross*—that the Age Discrimination in Employment Act (ADEA) does not impose mixed-motive liability—apply to Title VII's anti-retaliation provision. If anything, these considerations apply with even greater force here because this case involves different provisions of the same statute: when Congress amended Title VII's anti-discrimination provision in 1991 to add mixed-motive liability, it chose *not* to amend Title VII's anti-retaliation provision to

add such liability. As in *Gross*, there is accordingly no reason to deviate from the traditional rule that requires the plaintiff to prove but-for causation. The Fifth Circuit decision therefore should be reversed.

Proper resolution of this issue is exceptionally important to the business community. Retaliation claims are already the fastest growing category of discrimination claims. A decision recognizing mixed-motive liability would expose employers to litigation—and potential liability—even when they made an employment decision for legitimate business reasons and would have made the exact same decision if they had not considered the improper factor. Moreover, adopting a mixed-motive regime would seriously impede summary judgment as a tool for weeding out meritless retaliation claims because a plaintiff's allegation that retaliation was *a* motive will be sufficient to defeat summary judgment even if the plaintiff cannot establish that it was the but-for motive. This, in turn, will force employers to settle baseless lawsuits to avoid the time and expense of trials and to implement unnecessary policies that will chill legitimate business decisions. At the same time, a decision reinvigorating the approach laid out in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality), would impose substantial costs on the court system. It would reignite conflicts in the lower courts and foster overly complex trials with confusing jury instructions.

This case itself aptly illustrates the high costs of such a rule. The defendant medical school was party to an affiliation agreement with the hospital where the plaintiff sought a job. Pet. App. 4. Under that agreement, the plaintiff could not work at the hospital unless he was a faculty member at the medical school,

at which he was no longer employed. *Id.* at 4-5. The defendant thus had a perfectly legitimate reason for opposing his employment at the hospital (the affiliation agreement)—and that reason was completely unrelated to the plaintiff's complaints of discrimination. *Id.* at 5. Nevertheless, under the Fifth Circuit rule that a mixed motive may subject the employer to liability, the case proceeded past summary judgment, a jury held the defendant liable under a mixed-motive instruction, *id.* at 6, 12 n.16, and the Fifth Circuit upheld the verdict on the retaliation claim, *id.* at 15. Nothing in the statute requires such an expansive rule of liability for retaliation claims, and the Court should not impose one.

ARGUMENT

The path for resolving this case is marked by the text and history of key provisions of Title VII of the Civil Rights Act of 1964 and this Court's precedent interpreting Title VII and analogous statutes. Title VII contains two substantive prohibitions relevant to this case. The anti-discrimination provision (§ 703) makes it unlawful for an employer to make certain employment decisions "*because of* [an] individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a) (emphasis added). The anti-retaliation provision (§ 704) makes it unlawful for an employer to "discriminate against any of his employees or applicants for employees ... *because* he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [§§ 2000e-2000e-17]." 42 U.S.C. § 2000e-3(a) (emphasis added).

In *Price Waterhouse*, a plurality interpreted Title VII's anti-discrimination provision to impose liability

when an improper consideration is a "motivating" factor in the employer's decision, and held that the employer could avoid liability only by proving the "affirmative defense" that it "would have made the same decision even if it had not taken the plaintiff's gender into account." 490 U.S. at 245-46, 258. Justice White concurred in the judgment, but he would have required the plaintiff to "show that the unlawful motive was a *substantial* factor in the adverse employment action" before imposing mixed-motive liability. *Id.* at 259. Justice O'Connor also concurred in the judgment and agreed with Justice White that the plaintiff must show the improper criterion was a "substantial" factor in the employment decision, *id.*, at 265, but she also would have required the plaintiff to come forward with "direct evidence" that the employer relied on the improper consideration, *id.* at 270-71.

Two years after *Price Waterhouse*, Congress enacted the Civil Rights Act of 1991. Among other things, Congress amended Title VII's anti-discrimination provision to establish mixed-motive liability for discrimination—but *not* for retaliation. 42 U.S.C. § 2000e-2(m) ("[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."). Congress also effectively changed the *Price Waterhouse* "same decision" defense from an affirmative defense against liability to a defense only against damages. 42 U.S.C. § 2000e-5(g)(B). As part of the 1991 Amendments, Congress made various amendments to other provisions of Title VII, including

the anti-retaliation provision, as well as to other discrimination laws, including the ADEA.

The Court recently addressed this statutory history in *Gross*, 557 U.S. 167, when it held that the ADEA does not impose mixed-motive liability. The Court first recognized that it has never held that the *Price Waterhouse* "burden-shifting framework applies to ADEA claims." *Id.* at 174. In addition, the Court stressed that when Congress amended Title VII in 1991 to create "motivating factor" liability for discrimination claims, it did not add a similar provision to the ADEA, which indicates that Congress did not intend the ADEA to have mixed-motive liability. *Id.* Relying on the ordinary meaning of the ADEA liability provision and the general rule reflected in the Court's precedents, the Court held that the prohibition against discrimination "because of" age requires the plaintiff to prove that age was the "but for" cause of the employer's action. *Id.* at 175-78.

The question presented in this case is whether Title VII's anti-retaliation provision requires a plaintiff to prove but-for causation, or whether proof of a mixed-motive is sufficient. The text and history of Title VII's anti-retaliation provision—when considered under the reasoning of *Gross*—compel the conclusion that but-for causation is necessary. That conclusion is also supported by powerful practical considerations.

I. *GROSS* COMPELS THE CONCLUSION THAT THERE IS NO MIXED-MOTIVE LIABILITY FOR TITLE VII RETALIATION CLAIMS

Gross controls this case. In *Gross*, this Court held that a "mixed-motives jury instruction" is "never

proper" in an ADEA suit. 557 U.S. at 169-70. The Court declined to follow its decisions construing Title VII's anti-discrimination provision, including *Price Waterhouse*. First, the Court noted that it had "never held that [the 'motivating factor'] burden-shifting framework applies to ADEA claims." *Id.* at 174. Second, the Court pointed to the fact that Congress amended Title VII's anti-discrimination provision in 1991 to adopt mixed-motive liability, but did "not make similar changes to the ADEA." *Id.* This was significant, the Court explained, because "[w]hen Congress amends one statutory provision but not another, it is presumed to have acted intentionally." *Id.* Moreover, the "'negative implications raised by disparate provisions are strongest' when the provisions were 'considered simultaneously when the language raising the implication was inserted,'" which was true for the ADEA and Title VII in 1991. *Id.* at 175 (citation omitted).

The same reasoning compels the conclusion that Title VII's anti-retaliation provision requires but-for causation as well. First, just like the ADEA, this Court has never held that the motivating-factor standard applies to Title VII *retaliation* claims, 42 U.S.C. § 2000e-3(a). *Price Waterhouse* was grounded on an interpretation of the anti-discrimination provision of Title VII, 42 U.S.C. §2000e-2(a). *See Price Waterhouse*, 490 U.S. at 239-40. The decision did not interpret the separate anti-retaliation provision. And it is not sufficient to say that *Price Waterhouse* concerned the same *statute*, when its holding is tied to a completely different substantive provision. *Stare decisis*, regardless of its strength when it comes to

decisions interpreting statutes, is limited only to the provisions actually construed by this Court.

Second, just as was true for the ADEA, Congress did *not* amend Title VII's anti-retaliation provision to add mixed-motive liability in 1991. Indeed, the negative implication is even stronger here than in *Gross*. When Congress added § 2000e-2(m) to Title VII in the 1991 Amendments, it created mixed-motive liability *only* for claims based on "race, color, religion, sex, or national origin." Congress plainly *omitted* retaliation claims. The negative implication is at its height because Congress was amending the *same statute*—Title VII Moreover, Congress made other changes to Title VII's anti-retaliation provision at the same time. *See* Pub. L. No. 102-166, §§ 102, 109, 105 Stat. 1071, 1072, 1077 (1991) (amending § 704 of Title VII). The rationale of *Gross* thus makes clear that *Price Waterhouse* does not control this case.

Just as was true for the ADEA, the text and default rules of civil litigation compel the conclusion that Title VII's anti-retaliation provision does not allow mixed motive liability. The anti-retaliation provision makes it unlawful for "an employer to discriminate against any of his employees ... *because* he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a) (emphasis added). The ordinary meaning of "because"—just like that of "because of"—is "by reason of: on account of." *Gross*, 557 U.S. at 176 (quoting *Webster's Third New International Dictionary* 194 (1966)). This Court has repeatedly interpreted the phrase "because of" as

requiring proof of "but for" causation. *Id.* (citing cases). There is no reason to interpret "because" any differently here. Accordingly, as in *Gross*, "[a] plaintiff must prove by a preponderance of the evidence" that retaliation "was the 'but-for' cause of the challenged employer decision." *Id.* at 177-78.

In *Gross*, the Court observed that it "'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.'" *Id.* at 174 (citation omitted). Here, such a "critical examination" shows that the rules applicable under Title VII's anti-discrimination provision do not apply to the separate anti-retaliation provision.[2]

II. MIXED-MOTIVE LIABILITY FOR TITLE VII RETALIATION CLAIMS WILL IMPOSE SUBSTANTIAL COSTS ON EMPLOYERS

The Court need go no further to resolve this case. But important practical considerations nevertheless provide additional reason for this Court to tread carefully in this area and not extend mixed-motive

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[2] To be clear, *stare decisis* demands adherence to *Gross*, not *Price Waterhouse*, for purposes of resolving the question presented by this case. *Gross* is the more recent precedent of this Court and its reasoning applies directly to the question presented by this Court. Although *Price Waterhouse* involved Title VII, it did not involve Title VII's anti-retaliation provision. Therefore, reliance on *Price Waterhouse* here is just as misplaced as it was in *Gross* in interpreting the ADEA. Moreover, even as to Title VII, Congress overrode *Price Waterhouse* in relevant part in adopting a statutory mixed-motive provision in 1991 for discrimination claims. *See Gross*, 557 U.S. at 178 n.5. The *stare decisis* force of *Price Waterhouse* is therefore fleeting even as to the interpretation of Title VII's anti-discrimination provision.

liability to Title VII's anti-retaliation provision. Doing so would upset the balance that Congress struck in protecting the rights of employees from discrimination while respecting the managerial prerogatives of employers. Such a disruptive act should come, if at all, only from the conscious Act of Congress.

A. Mixed-Motive Liability Substantially Lowers The Bar For Retaliation Claims

Title VII's anti-retaliation provision unquestionably serves as an important component of the statute's protections against discrimination. But as this Court has recognized, Congress did not intend the anti-retaliation provision to trump all other interests. *Cf. Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006) ("The anti-retaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm"). Adopting a mixed-motive regime for retaliation claims would expand the provision in a dramatic fashion that conflicts with the ordinary rules of civil litigation, would impose enormous costs on employers and the courts, and goes beyond Congress's express intent.

The Fifth Circuit rule that *Price Waterhouse* governs retaliation claims—and thus shifts the burden of proof to the employer in retaliation cases—is a stark departure from the general rule that the plaintiff bears the burden of proving his case. The "'conventional rule of civil litigation'" "requires a plaintiff to prove his case 'by a preponderance of the evidence.'" *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003); *see also* Restatement (Second) of Torts § 433B(1) (1965) ("[T]he burden of proof that the tortious conduct of the defendant has caused the harm to the plaintiff is upon the plaintiff."). A plaintiff claiming discrimination thus

ordinarily has the burden of proving that the improper consideration was the "but for" cause of the employer's action. *See, e.g.*, *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 n.10 (1976). And to meet that burden, the plaintiff must show that the improper consideration "actually played a role in that process and had a *determinative* influence on the outcome." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (emphasis added); *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000).

Because intentional discrimination is often an "elusive factual question," *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 n.8 (1981), the Court has adopted a burden-shifting framework to help plaintiffs meet their burden in discrimination cases by "forcing the defendant to come forward" with an explanation for its action, *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-11 (1993). This framework, which is "intended progressively to sharpen the inquiry" in a way that ultimately helps plaintiffs, *Burdine*, 450 U.S. at 256 n.8, but it does so within the confines of the traditional rule that the plaintiff bears the burden of proving his case. The Court has been careful repeatedly to emphasize that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.* at 253; *Reeves*, 530 U.S. at 143 (quoting *Burdine*); *Hicks*, 509 U.S. at 507 (same).

By contrast, the Fifth Circuit's rule fundamentally changes the nature of the lawsuit: rather than the plaintiff having to prove discrimination, the defendant has to prove that it did not discriminate. Under the Fifth Circuit's rule, the plaintiff needs to show only that the impermissible factor was a "'motivating' or

'substantial' factor in the employer's decision," and then the "burden of persuasion ... shift[s] to the defendant" to show by a "preponderance of evidence that it would have taken the same employment action even without consideration of the prohibited factor." *Smith v. Xerox Corp.*, 602 F.3d 320, 326 (5th Cir. 2010).

This standard is improperly lax in two key respects. First, the plaintiff's required showing is reduced: the plaintiff needs to show only that the impermissible factor was a *motivating* factor, as opposed to a *determinative* factor. Second, the ultimate burden shifts to the defendant: the *defendant* has to prove that it would have reached the same decision, as opposed to the *plaintiff* having to prove that the defendant's legitimate reason was pretextual or that the improper reason "more likely" motivated the employer, *Burdine*, 450 U.S. at 256. In other words, employers have to prove the negative—never an easy task. *Elkins v. United States*, 364 U.S. 206, 218 (1960) ("[A]s a practical matter it is never easy to prove a negative ...."). For several reasons, these change will have enormous consequences for employers.

First, going from "but-for" to "motivating" factor makes it significantly easier for plaintiffs to allege—and harder for defendants to defend against—retaliation claims. Under this standard, virtually every employee who engages in protected activity and later suffers an adverse action will be able to allege retaliation under Title VII. Employment decisions are invariably subjective in some measure. So lower courts may well accept that retaliation was *a* motivating factor based simply on a showing that the employer knew that the plaintiff engaged in protected activity—knowledge that often exists but hardly establishes an

intent to retaliate for engaging in protected activity.

A mixed-motive liability regime for retaliation claims would have particularly severe consequences for large corporations and retailers with geographically dispersed operations. These employers rely on the enforcement of neutral written policies to govern employment decisions to help prevent discrimination. Yet, as this case illustrates—under the mixed-motive liability rule—even when an employer fires an employee pursuant to a neutral policy, an employee may prevail at trial simply by showing a supervisor was *also* motivated by retaliation. Congress would not have intended that result. Title VII "was not intended to 'diminish traditional management prerogatives.'" *Burdine*, 450 U.S. at 259 (citation omitted).

Second, transforming causation from an element of the plaintiff's claim to an affirmative defense for the defendant will make it more difficult to weed out baseless claims before trial. If a complaint failed to allege sufficient "factual content" regarding but-for causation to cross "'the line from conceivable to plausible,'" *Ashcroft v. Iqbal*, 556 U.S. 662, 683 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)), it would be subject to dismissal under Federal Rule of Civil Procedure 12(b)(6). Under a mixed-motive rule, it will be easier for a plaintiff to allege facts sufficient to cross that line. Moreover, an employer may not be able to move to dismiss on the ground that it would have taken the same action regardless of the improper factor because that is an "affirmative defense" under *Price Waterhouse*, 490 U.S. at 246, requiring factual development that would preclude a Rule 12(b)(6) motion. *See* 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and*

Procedure § 1357 (3d ed. 2004); 2 James Wm. Moore, *Moore's Federal Practice* § 12.34 (3d ed. 2012).

For similar reasons, a mixed-motive liability regime will impact the resolution of cases on summary judgment. Summary judgment is "an integral part of the Federal Rules," "designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Its "principal purpose" "is to isolate and dispose of factually unsupported claims or defenses." *Id.* at 323-24. It is beneficial for litigants and the court system—it "prevent[s] vexation and delay, improve[s] the machinery of justice, promote[s] the expeditious disposition of cases, and avoid[s] unnecessary trials." 10A Charles Alan Wright et al., *Federal Practice & Procedure* § 2712 (1998) (footnote omitted).

A mixed-motive rule will make it more difficult to resolve cases on summary judgment. To survive summary judgment under conventional but-for causation principles, a plaintiff must show that a jury could conclude that the employer would not have taken the action but for the alleged discriminatory purpose. By contrast, under the mixed-motive liability regime, the defendant bears the burden of proving an *absence* of causation—that the improper factor did *not* cause its decision. A plaintiff therefore can thwart a motion for summary judgment simply by showing that there is a material issue of fact over whether the allegedly discriminatory purpose was *a* motivating fact—a much easier showing. Once the plaintiff makes that showing, the defendant can prevail only by showing that there is no evidence from which a jury could find the employer would not have taken the action, even if it had not considered the improper factor. It is no wonder, then,

that the dissenters in *Smith* observed that the mixed-motive liability rule "allows virtually every pretext case to be given to the jury as a mixed-motive case." 602 F.3d at 339 (Jolly, J., dissenting); *see also Price Waterhouse*, 490 U.S. at 291 (Kennedy, J., dissenting).

Finally, the effects of a mixed-motive liability rule will be even more detrimental if courts limit the "same decision" defense to being a defense against damages, as in 42 U.S.C. § 2000e-5(g)(2)(B), rather than a defense against liability in general (including on other forms of relief), as the district court did here. *See* Pet. App. 42-44.[3] Section 2000e-5(g)(2)(B) provides that when "an individual proves a violation under section 2000e–2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor," the court may grant injunctive relief, attorney's fees, and costs—but not damages. By its terms, § 2000e-5(g)(2)(B) does not apply to retaliation claims because § 2000e-2(m) covers only those claims based on "race, color, religion, sex, or national origin."

Despite the clear textual limits on § 2000e-5(g)(2)(B), the district court below made the "same decision" defense a defense only to damages for the retaliation claim—and not to all forms of liability,

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[3] The EEOC has also taken the position that § 2000e-5(g)(2)(B) applies to Title VII retaliation claims. *See* EEOC, EEOC Directives Transmittal No. 915.003, Compliance Manual, Section 8: Retaliation, at § 8-16 (May 20, 1998), *available at* http://www.eeoc.gov/policy/docs/retal.pdf ("If there is direct evidence that retaliation was a motive for the adverse action, 'cause' should be found. Evidence as to any additional legitimate motive would be relevant only to relief, under a mixed-motives analysis."). That position should be rejected.

including injunctive relief. Pet. App. 42-44. If courts improperly apply § 2000e-5(g)(2)(B) to retaliation claims, they will hold employers liable for injunctive relief, attorney's fees, and costs even when the employer would have taken the same action regardless of the fact that the employee engaged in protected activity. This expansion of *liability* is clearly not the balance Congress struck when it enacted § 2000e-5(g)(2)(B) to apply only to discrimination claims.

B. The Spike In Retaliation Claims Generally Magnifies These Concerns

Holding that *Gross* does not apply to Title VII's retaliation provision could have profound effects on all discrimination statutes that use the "because of" standard. Indeed, it would threaten to overturn decisions holding that mixed motive liability is not available under § 1983, *see Fairley v. Andrews*, 578 F.3d 518 (7th Cir. 2009), *cert. denied*, 130 S. Ct. 3320 (2010); the Americans with Disabilities Act (ADA), *see, e.g.*, *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312 (6th Cir. 2012); and the Rehabilitation Act, *Palmquist v. Shinseki*, 689 F.3d 66 (1st Cir. 2012). But the effects will be most far-reaching in the context of retaliation claims, such as the one at issue in this case.

Retaliation claims have increased at an astounding rate. According to EEOC statistics, in Fiscal Year 1997, individuals filed 16,394 charges based on Title VII's retaliation provision.[4] In Fiscal Year 2012, individuals filed almost double the number of charges—

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[4] All EEOC statistics cited in the following discussion are found at EEOC, Charge Statistics FY 1997-FY 2011, *available at* http://www.eeoc.gov/eeoc/statistics/ enforcement/charges.cfm (last visited Mar. 8, 2013).

31,208—based on Title VII's retaliation provision. As a percentage of all charges, the number of Title VII retaliation charges increased from 20.3% in Fiscal Year 1997 to 31.4% in Fiscal Year 2012. When charges made under the ADA, the ADEA, and the Equal Pay Act's retaliation provisions are included, the statistics are even more dramatic. In Fiscal Year 1997, the total number of retaliation charges under all statutes was 18,198, which accounted for 22.6% of all charges. In Fiscal Year 2012, the total number of retaliation charges under all statutes was 37,836—accounting for *38.1%* of all charges. Since Fiscal Year 2009, the number of total retaliation charges has consistently been the highest number of charges. And yet, while the number of retaliation charges has skyrocketed, the EEOC has concluded that the large majority of these charges are unfounded. In Fiscal Year 2012, for example, the EEOC found reasonable cause in only 1,800 of the charges that proceeded to a reasonable cause determination. By contrast, the EEOC found that 27,077 of the charges *lacked* reasonable cause.

The impact of allowing mixed-motive claims is amplified in the retaliation context because Title VII's anti-retaliation provision already covers more potential plaintiffs and actions than the core anti-discrimination provisions. There are inherently a larger number of potential retaliation plaintiffs than discrimination plaintiffs because a retaliation plaintiff does not have to be a member of a protected group. Indeed, in the wake of this Court's recent cases, potential plaintiffs now include employees who engage in a broad definition of protected conduct (*see Crawford v. Metropolitan Government*, 555 U.S. 271, 273 (2009); *Burlington Northern*, 548 U.S. at 57), former employees who

engaged in protected conduct (*see Robinson v. Shell Oil Co.* 519 U.S. 337, 346 (1997)), and employees who have some connection with someone in either of those two groups (*see Thompson v. North American Stainless, LP*, 131 S. Ct. 863, 869-70 (2011)). Furthermore, under this Court's precedent, liability can be predicated on an employer's action that affects an employee in the workplace *or* outside of it (*see Burlington Northern*, 548 U.S. at 57). The scope of retaliation coverage under Title VII therefore is already much more expansive than discrimination coverage. Of course, that is attributable in part to the different purpose of an anti-retaliation provision. But the broader scope of coverage nevertheless magnifies the impact of this case on retaliation claims.

The large majority of retaliation charges prove to be unfounded. *Supra* at 17. But the explosion of retaliation claims in the past few years has imposed added costs and litigation burdens on employers trying to make ends meet in challenging economic times.

C. The Increase In Retaliation Charges Will Impose Significant Costs On Employers

The increase in retaliation and other claims due to the recognition of mixed-motive liability would impose significant direct and indirect costs on employers.

The direct costs would be substantial. Litigation is costly—and it is not getting cheaper. As one commentator observed: "The Rand Institute estimated in 1988 that defense costs in wrongful discharge actions averaged over $80,000. By 1994, costs were estimated to have increased to $124,000." Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 31 (1998)

(footnote omitted). Another study estimates that "an employer may spend close to $100,000 to defend against an individual claim of discrimination." Jessica Fink, *Unintended Consequences: How Antidiscrimination Litigation Increases Group Bias in Employer-Defendants*, 38 N.M. L. Rev. 333, 340 (2008). And others have estimated that "it costs employers (1) between $4000 and $10,000 to defend an EEOC charge, (2) at least $75,000 to take a case to summary judgment, and (3) at least $125,000 and possibly over $500,000 to defend a case at trial." David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1579 (2005) (footnote omitted).

The increase in retaliation claims due to the recognition of mixed-motive liability would also impose substantial indirect costs on employers. Public court battles in discrimination or retaliation suits affect the public perception of businesses—even when businesses prevail in the underlying suits. They also exact a toll on businesses, taking employees away from work to testify or help prepare for trial, lowering employee morale, and diverting often scarce resources.

Given the high cost of defending against an employment suit and the reputational costs of trial, employers have significant incentives to settle, even when they are confident they would ultimately prevail at trial. Commentators have noted the "discrimination '*de facto* severance system'" whereby employers pay employees who file even meritless EEOC charges to avoid the costs of defending against discrimination charges. Sherwyn, 57 Stan. L. Rev. at 1579; *see also* Jessica K. Fink, *Protected By Association? The Supreme Court's Incomplete Approach To Defining*

The Scope Of The Third-Party Retaliation Doctrine, 63 Hastings L.J. 521, 545 (2012) ("Even where the termination or demotion has nothing to do with the employee's gender or nationality or previous discrimination complaint, savvy employers know that it might cost them well into the six figures to defend against a Title VII discrimination or retaliation suit—even where the suit ultimately proves to be without merit."); David Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water, and Constructing a New Sink in the Process*, 2 U. Pa. J. Lab. & Emp. L. 73, 82 (1999) ("[E]mployees file baseless discrimination charges because they know that their former employers are willing to pay a nominal amount of money in order to avoid the aggravation, costs, and losses of time, resources, and productivity that inevitably arise in defending such allegations.") (footnote omitted).

The increase in mixed-motive suits will also impose indirect costs by chilling legitimate business practices. Almost any employee who engages in protected activity could file a mixed-motive retaliation claim. Employers will be overly reticent to take any action regarding such employees, regardless of the existence of perfectly legitimate business reasons to do so, such as application of the sort of neutral policies at issue in this case. Commentators have warned against the "slippery slope" of liability and "the reality that, in the modern workplace, employers often act in prophylactic ways to avoid violating the law—taking measures not otherwise required by law in order to minimize their potential liability." Fink, 63 Hastings L. J. at 545. That concern is paramount in the context of retaliation

where the potential plaintiffs extend beyond those who engage in protected activities and to employer actions beyond those at the workplace.

The Court has previously recognized that "Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business" and "demanded as a price for their support that 'management prerogatives . . . be left undisturbed to the greatest extent possible.'" *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 206 (1979) (quoting H.R. Rep. No. 88-914, at 29 (1963)). In 1991, Congress determined that mixed-motive liability was appropriate for Title VII discrimination claims. But Congress—which chose not to make any similar amendment in 1991 to Title VII's anti-retaliation provision—quite evidently has not made that judgment for retaliation claims.

Especially in light of the significant practical consequences of extending mixed-motive liability to already skyrocketing retaliation claims, the Fifth Circuit was wrong to *infer* that Congress intended to adopt such a regime when it did not expressly do so.

III. MIXED-MOTIVE LIABILITY FOR TITLE VII RETALIATION CLAIMS ALSO WOULD CREATE A HOST OF OTHER ISSUES

In concluding that mixed-motive liability extended to retaliation claims under Title VII, the Fifth Circuit reasoned that *Price Waterhouse* governed such claims. *See Smith*, 602 F.3d at 330 (holding that *Price Waterhouse* is "our guiding light"). That reasoning is flawed for the reasons discussed above. But it is also important to recognize that adopting that rationale

would invite a host of different issues that have previously divided the lower courts and would add unnecessary complexity to retaliation trials.

A. Adopting Mixed-Motive Liability Will Invite If Not Exacerbate The Confusion That Followed *Price Waterhouse*

The Court's decision in *Price Waterhouse* left open and raised a number of questions regarding mixed-motive liability, which engendered confusion in the lower courts. Congress tried to eliminate some of the confusion by expressly establishing mixed-motive liability in the 1991 Amendments to Title VII's discrimination provision. If the Court takes a step backwards and returns to *Price Waterhouse* here, the prior questions will resurface—and new ones will surely develop—including the following:

Does the plaintiff have to come forward with direct evidence of discrimination? A conflict arose after *Price Waterhouse* over whether mixed-motive liability was always available or whether it was available only when the plaintiff came forward with direct evidence of discrimination. *See Desert Palace*, 539 U.S. at 95 (noting circuit conflict on this issue). Justice O'Connor would have required "direct evidence that an illegitimate criterion was a substantial factor in the decision," *Price Waterhouse*, 490 U.S. at 276, but the plurality, *id.* at 251-52, and Justice White, *id.* at 259, would have allowed the plaintiff to use direct or circumstantial evidence. *See Desert Palace*, 539 U.S. at 93-94. In *Desert Palace*, the Court resolved the issue for Title VII discrimination claims primarily based on the text of the 1991 Amendments, 42 U.S.C. § 2000e-2(m), but also cited background principles of civil and criminal law that allow the use of both direct and

circumstantial evidence. *See Desert Palace*, 539 U.S. at 98-101. After *Desert Palace*, lower courts remain divided on whether direct evidence is required in discrimination cases under statutes other than Title VII. *See* James Concannon, *Reprisal Revisited:* Gross v. FBL Financial Services, Inc. *and the End of Mixed-Motive Title VII Retaliation*, 17 Tex. J. on C.L. & C.R. 43, 63-67 (2011). Holding that mixed-motive liability applies to Title VII retaliation claims under *Price Waterhouse* will only increase the confusion.[5]

Does the plaintiff have to show that the impermissible factor was a "motivating factor" or a "substantial" factor? It was unclear after *Price Waterhouse* whether the plaintiff had to show that discrimination was a "motivating" factor or a "substantial" factor in order to receive a mixed motive instruction. The plurality in *Price Waterhouse* would have required the plaintiff to show only that the improper consideration was a "motivating part in an employment decision," 490 U.S. at 258, but Justices

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[5] In our view, the answer to this question is that the 1991 Amendments did not change Title VII's anti-retaliation provision, so *Desert Palace* is inapplicable. The Court recognized in *Gross* that "the textual differences between Title VII and the ADEA . . . prevent us from applying *Price Waterhouse* and *Desert Palace* to federal age discrimination claims," and the same reasoning applies to Title VII retaliation claims. *See supra* at 6-9. If the Court found mixed-motive liability for Title VII retaliation claims based on *Price Waterhouse*, direct evidence would be required under Justice O'Connor's opinion, which controls because it was the narrowest ground of decision. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (when there is no majority, the narrowest ground of decision controls). But one way or the other, the lower courts, and perhaps ultimately this Court, will have to sort this out if the Court holds that mixed-motive liability applies to Title VII retaliation claims.

White, *id.* at 259, and O'Connor, *id.* at 276, would have required that it be a "substantial factor" in the adverse employment action. *See Desert Palace*, 539 U.S. at 93-94. The 1991 Amendments adopted the "motivating factor" test, but only for discrimination claims, 42 U.S.C. § 2000e-2(m). If the Court were to return to *Price Waterhouse* for Title VII retaliation claims, this question therefore would reemerge.[6]

If the defendant shows that it would have reached the same decision without consideration of the improper factor, is the defendant exonerated from liability or merely damages? The Court held in *Price Waterhouse* that the "same decision" defense absolved the defendant of liability. *See* 490 U.S. at 258 (plurality); *id.* at 259-60 (opinion of White, J.); *id.* at 276 (opinion of O'Connor, J.). The 1991 Amendment made the "same decision" defense a defense only against damages (not against liability). *See* 42 U.S.C. § 2000e-5(g)(2)(B). For the retaliation claim at issue here, the district court treated the "same decision" defense as the more limited defense to damages, as in § 2000e-5(g)(2)(B), and that is the EEOC's position. *See supra* at 15-16 & n.3. A decision allowing a mixed-motive theory for retaliation claims would invite confusion on the scope of the "same decision" defense.[7]

How would mixed-motive liability interact with the McDonnell Douglas *framework? Price Waterhouse* left

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[6] In our view, the correct answer under *Marks* would be the higher "substantial factor" test adopted by Justices White and O'Connor because it represents a narrower ground of decision.

[7] In our view, the correct answer is that the 1991 Amendments do not change Title VII's anti-retaliation provision, so the "same decision" defense would exonerate the defendant from liability under *Price Waterhouse*.

open the questions of how the two frameworks interact and whether a plaintiff has to specify whether his case is a pretext or mixed-motive case, or whether he can proceed on both theories. The plurality noted that "[a]t some point in the proceedings, of course, the District Court must decide whether a particular case involves mixed motives. If the plaintiff fails to satisfy the factfinder that it is more likely than not that a forbidden characteristic played a part in the employment decision, then she may prevail only if she proves, following *Burdine*, that the employer's stated reason for its decision is pretextual." 490 U.S. at 247 n.12. Justice O'Connor's view was contingent on the direct evidence requirement: once "all the evidence has been received, the court should determine whether the *McDonnell Douglas* or *Price Waterhouse* framework properly applies to the evidence before it. If the plaintiff has failed to satisfy the *Price Waterhouse* threshold, the case should be decided under the principles enunciated in *McDonnell Douglas* and *Burdine*." *Id.* at 278. There is "widespread confusion" in the lower courts, which have taken various approaches to which framework applies, who decides (the plaintiff or the court), and at what stage in the litigation. *See* Kaitlin Picco, *The Mixed-Motive Mess: Defining and Applying a Mixed Motive Framework*, 26 A.B.A. J. Lab. & Emp. L. 461, 464-65 (2010).[8]

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[8] *See also* Scott Park, *Mixed-Motive Discrimination Cases And Summary Judgment*, 57 United States Attorneys' Bulletin 25, 27-29 (May 2009), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usab5702.pdf; David Sherwyn & Michael Heise, *The* Gross *Beast of Burden of Proof: Experimental Evidence on How the Burden of Proof Influences Employment*

In sum, reintroducing the *Price Waterhouse* rule will likely result in confusion among the lower courts on a number of related legal issues that no doubt will require the intervention of this Court. In addition to being costly for the court system, the lack of uniformity will make it difficult for businesses with multi-jurisdictional operations to order their behavior. That is all the more reason to avoid a ruling that returns the courts to the *Price Waterhouse* chaos.

B. Adopting Mixed-Motive Liability Will Unnecessarily Complicate Trials

Not only will mixed-motive liability engender conflicts among the lower courts over the governing legal principles under *Price Waterhouse*, it will be difficult for trial courts to *implement* the principles. Justice Kennedy recognized in *Price Waterhouse* that lower courts will "be saddled with the task" of implementing the standards that trigger mixed-motive liability: they will have to "generat[e] a jurisprudence of the meaning of 'substantial factor'" and "will also be required to make the often subtle and difficult distinction between 'direct' and 'indirect' or 'circumstantial' evidence." 490 U.S. at 291. Indeed, as Justice Kennedy observed, "[l]ower courts long have had difficulty applying *McDonnell Douglas* and *Burdine*. Addition of a second burden-shifting mechanism, the application of which itself depends on assessment of credibility and a determination whether evidence is sufficiently direct and substantial, is not likely to lend clarity to the process." *Id.* Ultimately, as Justice Kennedy added: "The Court's attempt at

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Discrimination Case Outcomes, 42 Ariz. St. L.J. 900, 918-20 (2010).

refinement provides limited practical benefits at the cost of confusion and complexity, with the attendant risk that the trier of fact will misapprehend the controlling legal principles and reach an incorrect decision." 490 U.S. at 287; *see also id.* at 290.

Justice Kennedy's dissent proved prophetic. As this Court observed in *Gross*, "it has become evident in the years since [*Price Waterhouse*] that its burden-shifting framework is difficult to apply." 557 U.S. at 179. Specifically, "in cases tried to a jury, courts have found it particularly difficult to craft an instruction to explain its burden-shifting framework." *Id.* Indeed, "the problems associated with its application have eliminated any perceivable benefit to extending its framework to ADEA claims." *Id.* The same goes for extending it to Title VII retaliation claims.

CONCLUSION

For the foregoing reasons, and those in petitioner's brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER,

Petitioner,

v.

NAIEL NASSAR, M.D.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* COMMITTEE OF INTERNS AND RESIDENTS SEIU; DOCTORS COUNCIL SEIU; AND KOREAN AMERICAN MEDICAL ASSOCIATION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

The Committee of Interns and Residents SEIU, ("CIR") is the primary national voice for resident physicians in the United States. CIR represents more than 13,000 resident physicians who provide healthcare to diverse populations in Massachusetts, New York, New Jersey, Florida, New Mexico, California, and the District of Columbia. CIR is keenly aware of the importance of a diverse, culturally competent physician workforce in order to provide safe and effective healthcare and to address health disparities. Due to its leadership in the quality improvement movement, CIR is well-attuned to the multiple and proven benefits of breaking the wall of silence in the healthcare setting. As an organization that has represented employed professionals for more than fifty years, CIR is well aware of discrimination and fear of retaliation in the medical profession. CIR strongly believes that the healthcare system will be unable to address pervasive discrimination unless physicians and others who experience or observe discrimination in the workplace are able to report the facts to their employer and have them investigated, without fear of retaliation.

Doctors Council SEIU is a labor organization that represents approximately 3,000 attending physicians in the public and private sector in New York, New Jersey,

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1. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amici Curiae* or their counsel made a monetary contribution to its preparation or submission. Letters evidencing the parties' blanket consent to the filing of *amicus* briefs have been filed with the clerk.

Pennsylvania, and Illinois. Many of our members are attending physicians employed by medical schools and professional corporations in teaching hospitals. Almost all are employed to treat the diverse and medically underserved population that depends upon our public hospitals and health care facilities for their medical needs. Doctors Council SEIU's interest in this case is in protecting employed physicians against unlawful discrimination and retaliation in their workplaces. Minority and women physicians are essential to the effective provision of health care to the diverse population that makes up our nation.

The Korean American Medical Association ("KAMA") is a non-profit organization of Korean American physicians across the United States. Founded in 1974, our mission is to unite physicians of Korean heritage to further global interaction and better the world through the sharing of medical knowledge and skills. Additionally, KAMA works to help Korean American physicians excel in all aspects of their medical career. Workplace discrimination and legal rules that inhibit doctors from alleging discrimination interferes with this mission. Further, a number of KAMA's members are international medical graduates, and KAMA is well aware of the challenges that they face in the workplace.

INTRODUCTION AND SUMMARY OF ARGUMENT

Title VII's antiretaliation provision undergirds its antidiscrimination provisions by providing a safe harbor for employees who allege discrimination before a court, administrative agency, or the employer itself. In turn,

the availability of the mixed-motive framework, first articulated in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), renders Title VII's antiretaliation provision more effective by relieving plaintiffs of the significant hurdle of proving in the first instance that the employer would have made a different decision in the hypothetical situation in which it had not been motivated by retaliatory animus.

Without an effective safe harbor, employees may feel that their safest course of action is to remain silent or seek alternative employment. However, neither silence nor exit does anything to prompt an employer to reform its employment practices. Thus, a pattern of discrimination followed by exit may result, ultimately reducing diversity in the medical profession.

When this dynamic occurs in academic medical environments like the University of Texas Southwestern Medical Center ("UTSW"), it harms not just employees, but also the quality of medical training and research, ultimately to the detriment of patients. A growing body of medical literature confirms that "[d]iversity among faculty enhances the ability of academic medicine to fulfill its educational, research, and patient-care missions," and "improves the quality of medical education,"[2] ultimately benefiting patients. The American Medical Association ("AMA") itself has recognized that a diverse medical profession is more likely to provide culturally effective health care and decrease disparities in the provision of

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2. Linda Pololi et al., *Race, Disadvantage and Faculty Experiences in Academic Medicine*, J. Gen. Internal Med. 1363, 1363 (2010).

health care along racial and ethnic lines.[3] Similarly, the Association of American Medical Colleges ("AAMC")[4] recently stated that the benefits of diversity in the medical education environment "are particularly important because public health is at stake, not just business interests,"[5] and that diversity is a core component of medical education that "drive[s] excellence and improve[s] patient care for all."[6]

Discrimination, though, interferes with this goal of achieving diversity. It is well documented that discrimination against minorities and women in academic medicine is a pervasive and serious problem. According to AAMC, there is "little real racial and ethnic diversity in academia and even less in leadership positions."[7] Further, a growing body of evidence shows that "race/ethnicity,

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3. *See* Br. for Association of American Medical Colleges et al. as *Amici Curiae* in Support of Respondents, Fisher v. University of Texas, No. 11-345, at 9-10 (Aug. 13, 2012) [hereinafter *AAMC Fisher Br.*] (identifying diversity in health profession as key to helping to eliminate racial and ethnic health disparities and to provide care to diverse society). The American Medical Association participated as *amicus curiae* on this brief. *Id.* at 2.

4. The American Association of Medical Colleges has filed an *amicus* brief in support of defendant UTSW in this case. *See* Br. for American Council on Education and Six Other Higher Education Organizations as *Amici Curiae* in Support of Petitioner, University of Texas Southwestern Medical Center v. Naiel Nassar, No. 12-484 (Mar. 11, 2013).

5. *AAMC Fisher Br.*, *supra*, at 13.

6. Association of American Medical Colleges, *Striving Toward Excellence: Faculty Diversity in Medical Education*, 4 (2009) [hereinafter AAMC, *Striving*].

7. *Id.* at 1.

gender, and foreign-born status often provoke bias and result in cumulative advantages or disadvantages" at work, which impact "faculty recruitment, promotion, and retention."[8] Studies have also found that minority faculty members are less likely to receive tenure and are promoted at lower rates than their white counterparts, and often perceive discrimination in their workplaces.[9]

Discrimination in academic medicine is exacerbated by a culture of workplace silence. Accordingly, it is critical that Title VII's antiretaliation provisions remain a viable source of protection for victims of discrimination who seek redress from their employers or the courts. Eliminating the mixed motive framework would threaten the willingness of physicians and other employees to take steps to oppose discrimination, ultimately harming the provision of medical care.

ARGUMENT

I. Requiring Plaintiffs to Prove That Their Employers Would Have Made a Different Decision Absent a Retaliatory Motive Would Undermine Title VII's Protections Against Discrimination.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), six Justices rejected the view that plaintiffs suing under the antidiscrimination provisions of Title VII were required to prove not only that bias infected their employers' decisions, but also that those decisions "would have been different if the employer had not discriminated." *Id.* at 237-

8. *Id.* at 8 (citation omitted).

9. *See infra* Part II.

38 (opinion of Brennan, J.). While the six Justices differed in some respects, all agreed that, at minimum, when a plaintiff has "shown by a preponderance of the evidence that an illegitimate criterion was a *substantial* factor in an adverse employment decision, the deterrent purpose of the statute has clearly been triggered." *Id.* at 265 (opinion of O'Connor, J., concurring) (emphasis in original); *see also id.* at 259-60 (opinion of White, J., concurring) (concluding that when a plaintiff has shown that discriminatory motive was "a *substantial* factor in the adverse employment action . . . . [t]he burden of persuasion then should have shifted to Price Waterhouse" to show that it would have made the same decision absent the discriminatory motive) (emphasis in original). Accordingly, under *Price Waterhouse*'s mixed motive framework, once a plaintiff has shown that discrimination played a substantial role in the employer's decision, the employer is then tasked with showing that it would have made the same decision even in the counterfactual situation in which it was not motivated by discrimination.

Following *Price Waterhouse*, Congress amended Title VII, finding that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace." Pub. L. No. 102-166, § 2(1), 105 Stat. 1071 (1991); *see also id.* § 3(4) (1991 Amendments designed to "respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination"). The 1991 Amendments confirmed that mixed motive liability will lie in cases in which a plaintiff shows that "race, color, religion, sex, or national origin was a motivating factor

for any employment practice." 42 U.S.C. § 2000e-2(m).[10] Further, the 1991 Amendments made the "same decision" defense relevant only at the remedy phase, limiting plaintiffs whose employers would have taken the same action even without discriminatory animus to declaratory and injunctive relief, and attorney's fees and costs. *Id.* § 2000e-5(g)(2)(B)(i).

Remarkably, UTSW argues that by failing to list retaliation in the mixed motive provisions of the 1991 Amendments, Congress actually *heightened* the proof required of mixed motive retaliation plaintiffs by limiting liability to cases where the plaintiff could show that retaliation was the but for cause of the challenged adverse employment action in the first instance. However, this reading is inconsistent with the text, history, and purpose of the 1991 Amendments.[11] In particular, *amici* urge this Court to interpret Title VII's antiretaliation provision in light of Congress's explicit deterrence goal. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1333 (2011) (interpreting FLSA antiretaliation provision in light of "functional considerations").

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10. In *Price-Waterhouse*, Justices O'Connor and White used the phrase "substantial factor" to characterize the plaintiff's initial burden, 490 U.S. at 259 (opinion of White, J.); *id.* at 265 (opinion of O'Connor, J.), whereas Justice Brennan used the phrase "motivating factor," *id.* at 250. This distinction, though, is one without a difference, because this Court uses those phrases interchangeably. *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

11. *Amici* will not repeat the Respondent's arguments on this point, but adopts them as if fully articulated herein.

Antiretaliation provisions make Title VII's enforcement scheme effective by preventing fear of retaliation from inducing workers to remain silent in the face of illegal treatment. *Kasten*, 131 S. Ct. at 1333 ("antiretaliation provision makes [FLSA] enforcement scheme effective by preventing 'fear of economic retaliation' from inducing workers 'quietly to accept substandard conditions'" (citation omitted)); *Crawford v. Metro. Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271, 279 (2009) (citing studies showing "fear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination") (internal quotation marks, citation, and brackets omitted); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006) (retaliation provision of Title VII "seeks to secure that primary objective" of ending workplace discrimination). Without adequate protections against retaliation, employees who have been discriminated against—those who have been harassed, for example, or demoted because of their race—may rationally decide to remain silent until they are out of their employer's reach, in other words, until they quit or are fired.

Requiring mixed motive retaliation plaintiffs to prove but for causation without the benefit of the mixed motive framework could have grave consequences in the context of academic medicine—a context already plagued by organizational cultures that reinforce silence.[12] When

12. *See* Kerm Henriksen & Elizabeth Dayton, *Organizational Silence and Hidden Threats to Patient Safety*, 41 Health Serv. Res. 1539-40 (2006) (reporting recent study in which "fewer than 10 percent of physicians, nurses, and clinical staff directly confronted their colleagues when they became aware of poor clinical judgment or shortcuts that could cause harm" and "[o]ne in five physicians said they have seen harm come to patients as a result") (citation omitted).

asked why employees declined to speak up about problems at work, department chairs in medicine and surgery from 127 U.S. academic health centers ranked "belief that speaking up will be ignored" as the number one reason, with "fear of repercussions" ranked either second (among medicine chairs) or third (among surgery chairs). Wiley Souba et al., *Elephants in Academic Medicine*, 86 Acad. Med. 1492, 1494 (2011). Within this context of organizational silence, minority doctors often face the difficult choice of "trying to decide when to confront bias and stereotypes in the workplace without negatively impacting their career development at an institution." *See* Eboni Price et al., *The Role of Cultural Diversity Climate in Recruitment, Promotion, and Retention of Faculty in Academic Medicine*, 20 J. Gen. Internal Med. 565, 568 (2005) (silence about bias and stereotypes as a choice related to an institution's "climate of diversity"); *see also* Marcella Nunez-Smith et al., *Race/Ethnicity and Workplace Discrimination: Results of a National Survey of Physicians*, 24 J. Gen. Internal Med. 1198, 1202 (2009) (2006-2007 national survey showing minority physicians felt less comfortable than white physicians communicating about race or ethnicity at work). These doctors often choose silence instead of informing their supervisors and employers about perceived discriminatory treatment. *See* Alice A. Tolbert Coombs & Roderick K. King, *Workplace Discrimination: Experiences of Practicing Physicians*, 97 J. Nat'l Med. Assoc. 467, 470 & 473 (2005) (though 63% of respondents experienced at least one form of discrimination, only 11.3% of respondents reported an incident of discrimination).[13]

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13. Furthermore, of the relatively small number of physicians who reported discrimination, nearly 70% of respondents found themselves either worse or no better off for having done so. Coombs & King, *supra*, at 473.

However, when physicians and other employees do not report discrimination at all, or when they wait to report until they have quit or been fired, they miss the opportunity to use "desirable informal workplace grievance procedures to secure compliance with the Act." *Kasten*, 131 S. Ct. at 1334 (citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998)). Thus, contrary to the suggestions of Petitioner and its *amici* that the mixed-motive framework of the 1991 Amendments or *Price Waterhouse* will drive baseless litigation, robust retaliation protections can help employers avoid lawsuits by encouraging employees to come forward when they first begin to suspect discrimination. *See Crawford*, 555 U.S. at 278-79 (citing petitioner's brief, which in turn cited studies showing that employers strengthened internal procedures for responding to discrimination complaints in response to *Ellerth* and *Faragher v. Boca Raton*, 524 U.S. 775 (1998)).[14]

This case reflects two primary reasons that employees remain silent – that speaking out will either do nothing,

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14. This view of the function of antiretaliation provisions accords with studies of effective workplace management. Employees are more likely to feel free to speak out and supply critical information to employers when they believe that managers "mak[e] decisions that . . . are also consistent, accurate, correctable, and suppress any bias," referred to as a positive procedural justice climate. Subrahmaniam Tangirala & Rangaraj Ramanujam, *Employee Silence on Critical Work Issues: The Cross Level Effects of Procedural Justice Climate*, 61 Personnel Psychol. 37, 39, 42 (2008). The threat of retaliation, then, defeats the creation of such a "procedural justice climate." *Id.*

or it will be punished.[15] After Dr. Nassar experienced what he perceived as discriminatory treatment from his immediate supervisor, Dr. Beth Levine, JA 24, 34, 243, 311, he discussed the incidents with Dr. J. Gregory Fitz, at that time the chair of internal medicine. JA 205-10. After no action was taken, JA 210, Dr. Nassar sought other work and ultimately resigned his position at UTSW, believing he had secured another job. JA 24 & 311-15. In his letter of resignation, Dr. Nassar described in more detail the discrimination that he suffered. JA 24-25 & 311-13. Dr. Nassar also sent his letter to additional UTSW representatives, including the UTSW president, and an external organization, the Dallas-Fort Worth office of the Council on American-Islamic Relations. JA 311.

Then, as a jury later found and the Fifth Circuit upheld, Dr. Fitz retaliated against Dr. Nassar, directing the rescission of his new job offer. *Nassar v. Univ. of Tex. Sw. Med. Ctr.*, 674 F.3d 448, 451 (2012). Having resigned his position at UTSW and with the Parkland job blocked, Dr. Nassar left for a less prestigious position. *Id.* This dynamic—in which an employee who reports discrimination is punished—only reinforces an institutional culture of silence, by sending the clear message that reporting discrimination can be dangerous to one's career.

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15. *See* Elizabeth Wolfe Morrison & Frances J. Milliken, *Organizational Silence: A Barrier to Change and Development in a Pluralistic World*, 25 Acad. Mgmt. Rev. 706, 714 (2000) (organizational silence exists when employees believe that "(1) speaking about problems in the organization is not worth the effort, and (2) voicing one's opinions and concerns is dangerous").

Title VII's antiretaliation provision can play its part in effectuating the statute's discrimination protections and in promoting internal reporting of discrimination only if employees have a reasonable chance to prove retaliation in court. A framework that requires plaintiffs to prove in the first instance that a hypothetical decision-maker—one that lacked retaliatory animus—would have made a different decision would leave many retaliation victims without a remedy. *See NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 403 (1983) (upholding NLRB's treatment of "same decision" affirmative defense and observing that "[i]t is fair that [the employer] bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing"). This is particularly so when multiple people work together to arrive at an employment decision, as regularly occurs in academic workplaces. *See* Paul R. McHugh, *A "Letter of Experience" About Faculty Promotion in Medical Schools*, 69 Acad. Med. 877, 880 (1994) ("decision for promotion rests on a judgment of peers who, *in committee*, reflect on all aspects of the nominee's career") (emphasis in original). In cases involving multiple decision makers, plaintiffs would have to prove not only that retaliation played a motivating or substantial role in the employment decision, but also that enough decision makers had enough retaliatory intent for that motive to predominate over the various additional motivations that might have also been at work. "Particularly in the context of the professional world, where decisions are often made by collegial bodies on the basis of largely subjective criteria, requiring the plaintiff to prove that *any* one factor was the definitive cause of the decision makers' action may be tantamount to declaring Title VII

inapplicable to such decisions." *Price Waterhouse*, 490 U.S. at 273 (opinion of O'Connor, J.) (emphasis in original).

Strong antiretaliation protections, including the availability of the mixed motive framework, help create the kind of workplace climate that promotes reporting of discrimination. Conversely, diminished protections, such as the "but for" standard advocated by UTSW, would make talented physicians, teachers, and researchers like Dr. Nassar even more reluctant to come forward regarding discrimination in academic medicine, allowing that discrimination to flourish. In the next section, *Amici* describe the extent to which discrimination now occurs in academic medicine, and on the threat it poses to public health.

II. Workplace Discrimination by Medical Schools Negatively Impacts the Training of Medical Professionals, the Provision of Healthcare, and the Advancement of Medical and Scientific Knowledge.

Quantitative and qualitative studies consistently reveal pervasive discrimination against minority and female faculty members at medical schools. According to these studies, minorities are less likely to be promoted than white faculty, report lower career satisfaction, and transition out of academia sooner than other faculty.[16] This can cause a vicious cycle: having less authority, prestige, or status can make one more vulnerable to retaliation, meaning that one consequence of discrimination in hiring and promotion is to leave victims of discrimination more vulnerable if they report.

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16. *See infra* nn. 19-23 & accompanying text.

Furthermore, as the AMA and AAMC have both recognized, serious adverse consequences arise from pervasive discrimination in the medical field. These consequences include underrepresentation of minorities and women among medical school faculty, which in turn impairs the provision of the best science, education, and medical care.[17]

Studies of medical schools have documented that a substantial number of minority and female faculty members experience discrimination in the workplace.[18] For

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17. For example, in addressing the need to diversify medical school faculties, the AAMC has called for a "culture change" in academic medicine, one that reframes diversity from being merely a tool benefitting minorities "to a core ingredient that propels excellence in research, teaching and clinical practice." *See* AAMC, *Striving*, *supra*, at 17. *See also* Pololi et al., *supra*, at 1363 ("[f]ailure to fully engage the skills and insights of [under-represented minority] faculty impairs our ability to provide the best science, education or medical care").

18. A similar dynamic operates more broadly in the medical profession. A national cross-sectional survey conducted in 2006-2007 found that 71% of black physicians, 45% of Asian physicians, 63% of "other" race physicians, and 27% of Hispanic/Latino(a) physicians reported having experienced racial/ethnic discrimination during their medical career. Nunez-Smith et al., *Race/Ethnicity and Workplace Discrimination*, *supra*, at 1200. This same survey found that 59% of black, 39% of Asian, 35% of "other" race, and 24% of Hispanic/Latino(a) physicians reported experiencing discrimination in their current work setting. *Id.* These high rates of reported workplace discrimination occurred regardless of specialty, geographic region, gender, years in practice, or age. *Id.* at 1203. These findings are consistent with numerous studies that have examined discrimination against minorities, women, and IMGs in the medical profession. *See, e.g.*,

example, in one national study of 1,979 full-time medical school faculty members at twenty-four randomly selected U.S. medical schools, nearly half of underrepresented minority doctors reported that they had personally experienced racial or ethnic discrimination either in their professional advancement or from a superior or colleague; some of their white colleagues also reported perceiving racial or ethnic bias in the work environment, but far fewer reported personally experiencing the effects of that bias.[19] The results of that study are as follows:

Coombs & King, *supra*, at 467 (study of Massachusetts physicians finding that over 60% of respondents believed discrimination against IMGs was very or somewhat significant; 48.1% believed racial discrimination was very or somewhat significant; 43.2%, gender discrimination); Miriam Komaromy et al., *Sexual Harassment in Medical Training*, 328 New Eng. J. Med. 322, 322 (1993) (noting study of female physicians that reported that 27 percent had been sexually harassed in the preceding year).

19. Neeraja B. Peterson et al., *Faculty Self-reported Experience with Racial and Ethnic Discrimination in Academic Medicine*, 19 J. Gen. Internal Med. 259, 263 (2004) (Table 2: Perception and Experience of Racial/Ethnic Bias by Minority Status; underrepresented minorities include African Americans, Mexican Americans, Puerto Ricans, and Native Americans; nonunderrepresented minorities include Asian Americans and other Hispanics).

	Under-represented Minorities	Non-Under-represented Minorities	Whites
Reported perception of racial or ethnic bias	63%	50%	29%
Reported personally experiencing racial or ethnic discrimination	48%	26%	7%

Minority faculty also report experiencing structural barriers to academic success and career satisfaction.[20]

Reports of discrimination by minority faculty members are consistent with documented racial and ethnic disparities in faculty promotion and tenure. *See, e.g.*, Anita Palepu et al., *Minority Faculty and Academic Rank in Medicine*, 280 J. Am. Med. Assoc. 767, 767 (1998) (minority faculty less likely than whites to be promoted to senior rank); Robert G. Petersdorf et al., *Minorities in Medicine: Past, Present, and Future*, 65 Acad. Med. 663 (1990) (minority faculty typically promoted to associate professor three to seven years later than white faculty). The most extensive study of faculty promotion in academic medicine found that minority faculty were less likely to be

20. Peterson et al., *supra*, at 263; Price et al., *supra*, at 568 (minority faculty have reported observing or experiencing significant levels of bias in recruitment efforts for faculty, fellowship and resident appointments).

promoted or to hold senior faculty rank when compared to white faculty, even after controlling for cohort, sex, tenure status, degree, department, medical school type, and receipt of National Institutes of Health research awards. Di Fang et al., *Racial and Ethnic Disparities in Faculty Promotion in Academic Medicine*, 284 J. Am. Med. Assoc. 1085, 1090-91 (2000) (examining 50,145 full-time US medical school faculty who became assistant or associate professors between 1980 and 1989, separated into five two-year cohorts, assessing attainment of promotion by 1997). And, minority assistant professors experienced lower rates of promotion in every cohort when compared with white professors, regardless of tenure-track status or having served as principal investigators on NIH research awards, even as their representation in academic medicine increased. *Id.* at 1089-90.[21]

National AAMC data has further documented that minority and female faculty members are leaving academic medicine at a higher rate than their white, male counterparts.[22] Several studies have found

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21. A similar pattern was observed for underrepresented minorities who were at the associate professor level between 1980 and 1989. Fang et al., *supra*, at 1090. *See also* Marcella Nunez-Smith et al., *Institutional Variation in the Promotion of Racial/Ethnic Minority Faculty at US Medical Schools*, 102 Am. J. Pub. Health 852, 856 (2012) (finding on average that promotion rates for Hispanic and Black academic medical center faculty were significantly lower than those of White faculty).

22. Bhagwan Satiani et al., *A Review of Trends in Attrition Rates for Surgical Faculty: A Case for a Sustainable Retention Strategy to Cope with Demographic and Economic Realities*, J. Am. C. Surgeons, online edition, (Mar. 21, 2013), available at http://www.sciencedirect.com/science/article/pii/S1072751513000860 (finding that non-white faculty left academic medicine at a higher

that discrimination—and limited opportunities for advancement resulting from discrimination—lead minority faculty to consider leaving their institutions or academic medicine in general sooner than whites. *See, e.g.*, Anita Palepu et al., *Specialty Choices, Compensation, and Career Satisfaction of Underrepresented Minority Faculty in Academic Medicine*, 75 Acad. Med. 157, 160 (2000) (adjusting for rank, compensation, department, and professional time allocation, under-represented minority faculty are more likely to leave medicine); Association of American Medical Colleges, *2008 Diversity Research Forum: The Importance and Benefits of Diverse Faculty in Academic Medicine: Implications for Recruitment, Retention and Promotion*, at 10-11 (2009) (comprehensive study finding that the institutional climate of racial and ethnic discrimination was one of the top reasons faculty contemplated departure), *available at* https://members.aamc.org/eweb/upload/The%20Diversity%20Research%20Forum%20The%20Importance%20and%20Benefits%20of%20Diverse%20Fac%20in%20Acad%20Med.pdf. One study found that half of surveyed minority faculty members were considering leaving their respective institutions within three years due to concerns about career advancement or an institutional climate of racial or ethnic discrimination. *Id.* at 11. The AAMC and

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rate than white faculty); Hisashi Yamagata, American Association of Medical Colleges, *Trends in Faculty Attrition at US Medical Schools, 1980-1999*, at 1-2 (2002); National Academy of Science, *Beyond Bias and Barriers: Fulfilling the Potential of Women in Academic Science and Engineering* 92 (2006) ("Across all fields of science and engineering women are 40% more likely than men to exit the tenure track for an adjunct academic position ($p=0.01$). In addition to sex, the factors with the strongest correlation to this outcome were race or ethnicity, and employment at a private university or medical school.").

medical researchers have linked the lower representation and promotion rates of minority professors to barriers resulting from decades of systematic segregation and discrimination, as well as cultural and other factors in academic medicine that isolate minority faculty. Marc Nivet et al., *Diversity in Academic Medicine No. 1 Case for Minority Faculty Development Today*, 75 Mt. Sinai J. Med. 491, 494 (2008); AAMC, *Striving*, *supra*, at 7.

As discussed above, minority and female physicians and faculty members in academic medicine often do not report the discrimination they experience given the culture of silence in medicine, poor responses to complaints, and fear of adverse career consequences.[23] They are faced, then, with a choice between living with that discrimination or leaving their jobs. The greater rate at which minority doctors leave teaching as compared to white doctors suggests that many choose the latter. However, this choice is not without consequences to patients. As *amici* will now discuss in more detail, losing talented teachers, caregivers, and researchers due to workplace discrimination has a profound negative effect on public health by harming medical education

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23. Phyllis L. Carr et al., *A "Ton of Feathers": Gender Discrimination in Academic Medical Careers and How to Manage It*, 12 J. Women's Health 1009, 1015 (2003) ("It is perceived that those who fight the system [and report discrimination] formally suffer severe consequences. The other option rather than confronting the issue or suing is going to another institution."). As one study reported, minority faculty members considering whether to report racial discrimination have to weigh with the potential loss of peer credibility and respect, as well as a drain on personal time and energy. Megan R. Mahoney et al., *Minority Faculty Voices on Diversity in Academic Medicine: Perspectives from One School*, 83 Acad. Med. 781, 783 (2008).

and, ultimately, the ability of the medical profession to effectively meet the needs of the public it serves.

Minority faculty play important roles in all medical students' professional development as well as in increasing the number of minority students entering the medical profession. As the AAMC has recognized, future doctors will serve an increasingly multicultural community, and must be culturally competent "[i]n order to provide optimal care." AAMC, *Striving*, *supra*, at 6. Further, the presence of minority faculty in academic medicine can increase the number of minority students entering and remaining in medical school and can create a more supportive environment for those students. *See* Disadvantaged Minority Health Improvement Act of 1990, Pub. L. 101-527, § 1(b)(11), 104 Stat. 2312 (1990) (diverse faculty "an important factor in attracting minorities to pursue a career in the health professions"); AAMC, *Striving*, *supra*, at 6 (diverse faculty provide "support to racial and ethnic minority students in the form of academic guidance, mentorship and role modeling").

The role of minority faculty in supporting retention of minority medical students is particularly important because numerous studies have shown that those students are more likely than their white counterparts to go on to provide medical services to high-risk, underserved communities. *See* Price et al., *supra*, at 2 ("Ethnic minority physicians are more likely to practice in underserved areas and to care for patients of their own race/ethnic group, as well as low-income patients, Medicaid-insured and uninsured patients, and patients with poorer health status."); Joseph R. Betancourt et al., *Defining Cultural Competence: A Practical Framework for Addressing Race/Ethnic Disparities in Health and Health Care*, 118

Pub. Health Rep. 293, 296 (2003) ("minority professionals are more likely than their white counterparts to organize health care delivery systems to meet the needs of minority populations"). Further, "[e]thnic minority patients have been shown to experience higher levels of participation and satisfaction with ethnic minority physicians." Price et al., *supra*, at 2; *see also* Betancourt, *supra*, at 296 ("racial concordance between patient and physician is associated with greater patient satisfaction and higher self-rated quality of care").

Finally, the presence of minority faculty in academic medicine enhances research addressing the public health needs of minority communities and accelerate advances in medical and public health research more generally. Minority faculty often provide leadership in research related to racial health inequities and are more likely to engage in research addressing the needs of minority communities.[24] Nunez-Smith et al., *Institutional Variation*, *supra*, at 852; AAMC, *Striving*, *supra*, at 4 ("greater diversity will help ensure a more

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24. Racial disparities in incidence of certain serious diseases underscore the importance of this research. It is well-documented that "[s]ignificant health disparities exist along lines of socio-economic status, urban or rural residence and, most notably, race and ethnicity." Bruce G. Link, *Epidemiological Sociology and the Social Shaping of Population Health*, 49 J. Health & Soc. Behav. 367 (2008). Minority populations continue to disproportionately suffer from numerous health conditions. *See, e.g.*, Centers for Disease Control and Prevention, *CDC Health Disparities and Inequalities Report - United States* (2011), *available at* www.cdc.gov/mmrwr/pdf/other/su6001.pdf (illustrating increased rates of maternal death in minority populations based on quality of and access to medical care, socioeconomic conditions, and public health practices).

comprehensive research agenda"); National Institutes of Health, *Draft Report of the Advisory Committee to the Director Working Group on Diversity in the Biomedical Research Workforce* at 11 (2012), *available at* http://acd.od.nih.gov/Diversity%20in%20the%20Biomedical%20Research%20Workforce%20Report.pdf ("full power of diversity to pursue biomedical and behavioral research problems that address the needs of underrepresented racial and ethnic minorities is an important component of reducing these health inequities"). Further, medical research is enhanced when conducted by individuals with diverse views, whether that research involves issues that impact minority communities or not. *See NIH Draft Report*, *supra*, at 11 (studies show that "[d]iverse teams working together and capitalizing on individuality and distinct perspectives outperform homogenous teams"). Conversely, an atmosphere of discrimination undermines productive research: effective research environments depend on a "positive group climate and sufficient diversity of the group." Carole Bland & Mark Ruffin IV, *Characteristics of a Productive Research Environment: Literature Review*, 67 Acad. Med. 385 (1992) [hereinafter *NIH Draft Report*].

Thus, the presence of minority faculty in academic medicine is an essential component of meeting the public health care needs of diverse communities. Minority faculty foster the development of cultural competence in all future doctors and help create a supportive environment for minority medical students, who in turn are likely to practice in underserved communities. Additionally, they can enhance research, particularly affecting minority communities.

Nonetheless, the AAMC and researchers have observed that the recruitment and retention of minority faculty is often infected by bias, discrimination, and associated barriers for minorities in academic medicine. One study concluded that "valuable attributes and abilities [of minority faculty], instead of being perceived and received as beneficial, are often responded to as untoward contributions and become barriers to acceptance in the systems of academic medicine." Pololi et al., *supra*, at 1367. In addition, once hired, minority faculty often felt "isolation" and "experienced disrespect, discrimination, racism and a devaluing of their professional interests," in addition to facing lower rates of promotion in academic medicine. *Id.* These dynamics make Title VII protections more critical: absent adequate protection from retaliation, minority faculty could be further silenced, leading to greater dissastisfaction and attrition.

With Dr. Nassar's departure, UTSW lost a highly regarded teacher who instructed students, residents, and fellows on HIV treatment. JA 340-41. UTSW, Parkland, and Parkland's HIV patients lost an excellent diagnostic clinician who rated in the ninetieth percentile among all subspecialties in internal medicine at UTSW. JA 341. His departure compromised the care received by HIV patients at Parkland, which was unable to hire a replacement for over six months, and which even then hired a doctor insufficiently trained in HIV care. JA 65-66. UTSW lost a talented researcher who ran clinical trials, presented at national and international conferences, and published studies in peer-reviewed journals. JA 342-43. As the Association of American Medical Colleges

recognized in making its case for the benefits of diversity, "public health is at stake, not just business interests."[25] Discrimination in medical schools interferes with the goal of diversifying medical school administration, faculty, and students, and harms public health by negatively affecting training, provision of care, and advancement of medical and scientific knowledge. Insufficient safeguards against retaliation compound this harm, resulting in silence and exit of talented teachers, caregivers, and researchers, including Dr. Nassar.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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25. *AAMC Fisher Br.*, *supra*, at 13

AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

UNIVERSITY OF TEXAS
SOUTHWESTERN MEDICAL CENTER,
Petitioner,

v.

NAIEL NASSAR, M.D.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* DRI – THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

DRI – The Voice of the Defense Bar ("DRI") is a voluntary membership organization comprised of more than 22,000 attorneys defending businesses and individuals in civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys around the globe. Therefore, DRI seeks to address issues germane to defense attorneys and to the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, balanced, and - where national issues are involved – consistent. To promote its objectives, DRI participates as *amicus curiae* in cases such as this that raise issues of importance to its membership, their clients, and the civil justice system.

Based on its members' extensive practical experience, DRI is uniquely suited to explain why this Court should reverse the Fifth Circuit's judgment in this case. DRI's members are regularly called upon to defend their clients against Title VII retaliation and discrimination claims in federal courts around the country. Accordingly, DRI's members have considerable familiarity with the interplay between the causation standard employed in any given case and the resulting impact that standard imposes on a defendant's ability to mount a defense. Not only are

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[1] Letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, amicus curiae state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the amicus curiae, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

DRI's members well-versed in how retaliation cases are pleaded, briefed, and argued, they also witness first-hand how the causation standard is distilled into jury arguments and presentations at trial. The Fifth Circuit's decision in this case will have a profound effect on businesses and individuals who may be subject to these types of suits since it authorizes plaintiffs to proceed with Title VII retaliation claims on an undemanding causation standard that Congress never specifically embraced and that is inconsistent with the language used in the statute that governs retaliation claims in the context of Title VII. Left unreviewed by this Court, the Fifth Circuit's decision strips defendants of their ability to mount a defense to a Title VII retaliation claim and forces defendants to disprove any claimed retaliatory motive no matter how small a part it played in the challenged decision.

DRI's members also know, as a result of their experience in defending litigation, of the need for clarification of the law regarding the proper causation standard applicable in federal retaliation claims brought pursuant to Title VII. If affirmed, the decision below will adversely affect the judicial system and the rule of law by subjecting defendants to broad-reaching liability for retaliation that Congress did not intend. DRI has a strong interest in assuring that a uniform rule is adopted which safeguards plaintiffs' ability to bring Title VII retaliation claims but requires plaintiffs to satisfy "but-for" causation, a standard that is consistent with the statutory language enacted by Congress.

SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.§ 2000e, *et. seq.*, prohibits an employer from taking an adverse employment action against an employee "because he has opposed any practice made an unlawful employment practice" by Title VII or "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII. 42 U.S.C. § 2000e-3(a). By promising punishment for retaliatory acts, the retaliation provision of Title VII supports the statute's ultimate purpose – to protect against discrimination in the workplace. But when Congress amended Title VII's discrimination provision in 1991 to set forth a mixed-motive causation standard, 42 U.S.C. § 2000e-2(m), it left the language of § 2000e-3(a) unchanged. The decision to impose a more stringent causation burden on plaintiffs pursuing Title VII retaliation claims through use of the word "because" was intentional. *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 174 (2009) ("When Congress amends one statutory provision but not another, it is presumed to have acted intentionally."). Thus, the Fifth Circuit was wrong to engraft a looser standard on this claim despite Congress's retention of the word "because," a word that has long connoted "but for" causation in the common law, in common language, and in court interpretations of other statutory provisions.

The court is bound to interpret and apply statutes consistent with their express language. *Engine Mfrs. Assn. v. South Coast Air Quality Management Dist.*, 541 U.S. 246, 252 (2004). Under the plain language of

the retaliation provision, a plaintiff must prove that the adverse employment action occurred "because" of the charge; in the context of this case, the Respondent was required to prove that he was retaliated against because he complained about his supervisor's alleged discriminatory conduct. However, the Fifth Circuit held that plaintiffs suing for workplace retaliation under Title VII need only prove that retaliation was one of any number of factors in the challenged employment decision. *Nassar v. University of Texas Southwestern Medical Center*, 674 F.3d 448, 454 (5th Cir. 2012). In other words, the Fifth Circuit concluded that the proper causation standard applicable to retaliation claims brought pursuant to Title VII is a mixed-motive standard. *Id.* This runs directly afoul of the Court's determination in *Gross* that the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(a)(1), which uses the same language as is at issue here, imposes a "but-for" causation burden on plaintiffs bringing age discrimination claims. 557 U.S. at 180. In essence, the *Gross* Court determined that by virtue of the "because of" language in the ADEA, "a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action." *Id.* Accordingly, the *Gross* Court rejected the burden-shifting approach of other statutes that requires an employer to show that it would have taken the same action regardless of age, even if plaintiff has produced some evidence of age as a motivating factor for the adverse action.

The same result should issue under Title VII's retaliation provision, which includes the same

"because" language found in the ADEA. In fact, the law favors this result. *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934) (noting that "there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning."); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 86 (2006) (same). Where common words or phrases are interpreted differently from one employment statute to another, respect for the rule of law is undermined and those advising employers about potential liability are left to guess as to how the language will be interpreted.

Left intact, the Fifth Circuit's precedent-setting error threatens to create grave difficulties for employers forced to defend employment decisions with such a low standard regarding the cause of a termination or adverse employment action. Given the relative ease with which a plaintiff can show that some protected conduct was "a motivating factor" in the employer's decision, most retaliation claims under this framework will survive the summary judgment stage. At trial, juries will struggle to isolate one or another factor, and may err on the side of rendering a verdict against the employer even though the proofs demonstrate that the employer would have taken the adverse decision absent a retaliatory animus. These difficulties, and the attendant risk, will force employers to settle even meritless claims when the standard is lowered to allow liability for "a motivating factor" rather than a clear standard normally implied by but-for causation, i.e., but for the desire to retaliate, the employer would not have taken the adverse decision. With the number of Title VII retaliation charges on the rise, this phenomenon is likely to only increase in

coming years. U.S. Equal Employment Opportunity Commission, Charge Statistics, FY 1997 Through FY 2012, available at http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited February 28, 2013).

This case provides this Court with the opportunity to reaffirm that the Legislature's intent as expressed in the language of its statutes must control. Inserting a motivating-factor standard into Title VII retaliation claims not only lessens the burden of proof for plaintiffs and in turn increases the burden on employers, but it assumes the legislative power of balancing these interests while disregarding legislative intent.

ARGUMENT

I. The Decision Below Misreads the Language of the Statute, Which Requires a Plaintiff to Establish That the Claimed Retaliation Occurred "Because" of Protected Conduct –A Phrase the Court Has Interpreted in a Similar Context to Require a Showing of "But-For" Causation.

The issue that confronts the Court is, at its core, one of Congressional intent, and thus capable of resolution by the bedrock principles of statutory interpretation that have guided the judiciary for decades. Chief among these is the canon that interpretation of a statute "begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses that legislative purpose." *Engine Mfrs. Assn. v. South Coast Air Quality Management Dist.*, 541 U.S. 246, 252 (2004) (internal quotation marks omitted). When the

language used is unambiguous, the statutory text both begins and ends the inquiry. *BedRoc Ltd., LLC v. U.S.*, 541 U.S. 176, 183 (2004). See also *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (the "inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'"). Chief Justice John Marshall aptly observed that the power of the judiciary is confined to giving effect to the will of the Legislature as expressed in its statutory enactments:

> Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.

Osborn v. Bank of the U.S., 22 U.S. 738, 866 (1824) (per Marshall, C.J.).

It is with these principles in mind that the language of the retaliation provision of Title VII of the Civil Rights Act of 1964 (the "Act"), must be examined. That statute provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his

> employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, ***because*** he has opposed any practice made an unlawful employment practice by this subchapter, or ***because*** he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a) (emphasis added). While the Court has not had occasion to interpret the word "because" - and the causation standard it connotes - in the context of § 2000e-3(a), the Court has held, in the context of other similarly-worded statutes, that the word "because" requires a plaintiff to satisfy "but-for" causation. *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009). In *Gross*, the Court was called upon to interpret the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(a)(1), which makes it "unlawful for an employer...to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, ***because of*** such individual's age[.]" (Emphasis added). Noting that "because" is ordinarily defined to mean "for the reason that[,]" the *Gross* Court rejected outright the argument that the ADEA authorizes a mixed-motives age discrimination claim under which a plaintiff could prove age discrimination

simply by showing that age was a motivating factor in the employment decision even though another legitimate reason existed for the defendant's conduct. 557 U.S. at 176. To the contrary, the *Gross* Court held that to establish a disparate-treatment claim under the ADEA's clear language, "a plaintiff must prove by a preponderance of the evidence...that age was the 'but-for' cause of the challenged employer decision." 557 U.S. at 177-78. In this way, the *Gross* Court's holding reflects a commitment to the most fundamental semantic rule of statutory interpretation. *See, e.g.*, James Kent, Commentaries on American Law 432 (1826) ("The words of a statute are to be taken in their natural and ordinary signification and import; and if technical words are used, they are to be taken in a technical sense."). It also aligns with everyday usage of the word "because". *The American Heritage Dictionary of the English Language*, p. 159 (4th ed. 2006); Webster's Ninth Collegiate Dictionary, p. 139 (1987). When one speaks of an action occurring "because of" another action, a direct cause and effect relationship is presumed.

It is well settled that words should be interpreted consistently to have the same meaning. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85-86 (2006). And this principle is particularly important to lawyers representing employers because they must interpret a host of state and federal statutes governing employment relationships, and establishing potential causes of action. If the same words are interpreted differently from one employment statute to another, neither in-house counsel for employers nor those representing them in litigation will be able to predict how the courts will apply a particular provision. Such

varying interpretations of the same language undermine respect for the rule of law, and give rise to practical difficulties for those advising employers about potential liability.

The framework presented in *Gross* requires a plaintiff suing under Title VII's retaliation provision to prove that his charge, testimony, assistance, or participation in an investigation, proceeding, hearing or the like was the "but-for" cause of the alleged retaliatory action. To allow a Title VII retaliation claim to proceed under a mixed-motives theory, as the Fifth Circuit has in this case, *Nassar v. University of Texas Southwestern Medical Center*, 674 F.3d 448, 454 (5th Cir. 2012), results in a holding that directly contradicts Congressional intent as interpreted by this Court in *Gross*. It is not sheer coincidence that the "because" language of Title VII's retaliation provision withstood Congress's 1991 amendments to the statutory scheme. Congress made a deliberate choice to impose a more stringent causation burden on plaintiffs pursuing retaliation claims under Title VII than on plaintiffs pursuing discrimination claims under the same statutory scheme. The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), amended the 1964 version of the statute to establish a "motivating factor" test applicable to mixed-motive cases brought under Title VII's discrimination provision:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was ***a motivating factor*** for any employment

> practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m) (emphasis added). However, the amendments left the Act's retaliation provision unchanged, preserving the original "because" language.

The legislative decision to adopt a motivating-factor causation standard in the Title VII discrimination provision represents a deliberate, policy-driven choice to deviate from traditional, but-for causation principles. Congress explicitly enacted language with a much lesser standard, "a motivating factor", which was in turn interpreted by this Court to create liability in mixed motive cases. But Congress manifested no similar intent to tip the scales in favor of employees with respect to a diminished burden of proof for retaliation claims brought under Title VII. The fact that Congress amended the discrimination provision without also amending the retaliation provision is extremely persuasive that the motivating-factor standard was purposefully excluded. Where words differ, the Court presumes that "'Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62-63 (2006), quoting *Russello v. U.S.*, 464 U.S. 16, 23 (1983). Here, the different language of the retaliation and discrimination provisions reflects a legislative intent to impose different causation standards. In short, Congress intended its words to make a legal difference.

A more stringent causation standard for retaliation claims is entirely consistent with the purpose for which it was created. *Robinson v. Shell Oil Co.*, 519 U.S. 337,

345 (2001) (noting that Title VII's anti-retaliation provision must be interpreted in accordance with Title VII's overall remedial purpose). While the substantive provisions of Title VII seek to eliminate unlawful discrimination based on certain protected categories, the retaliation provision has a different objective: to protect those who seek to enforce their primary rights under the statute. *Id.* (noting that "[m]aintaining unfettered access to statutory remedial mechanisms" is "a primary purpose of antiretaliation provisions[.]"). The retaliation provision is not intended to create a broad right of action in itself. Its inclusion in Title VII serves primarily as a shield for aggrieved plaintiffs voicing discriminatory practices. See *Peterson v. Utah Dep't of Corr.*, 301 F.3d 1182, 1189 (10th Cir. 2002) ("The purpose of § 2000e-3(a) is to let employees feel free to express condemnation of discrimination that violates Title VII."); and *McMenemy v. City of Rochester*, 241 F.3d 279, 284 (2d Cir. 2001) (noting that without the protections afforded by the anti-retaliation provision, employers might be permitted to discriminate against an employee because of an employee's past use of Title VII's remedial mechanisms, which could significantly deter employees from engaging in such proceedings). By "promising punishment for such retaliatory acts by the employer," the retaliation provision strengthens "the statute's ultimate aim: protecting individuals against unlawful discrimination." James Concannon, *Reprisal Revisited: Gross v. FBL Financial Services, Inc. and The End of the Mixed Motive Title VII Retaliation*, 17 Tex. J. on C.L. & C.R. 43, 46 (Fall 2011). See also *Burlington*, *supra*, at 63 ("[t]he antiretaliation provision seeks to secure [the] primary objective [of the antidiscrimination provision] by preventing an

employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees."). The Legislature therefore carefully worded the retaliation provision consistent with its intended purpose. *Id.* ("[t]here is strong reason to believe that Congress intended the differences that its language suggest, for the [discrimination and retaliation] provisions differ not only in language but in purpose as well.").

The Court has the opportunity to clear up the confusion that has divided the federal appellate circuits and apply the *Gross* Court's analysis to Title VII's retaliation provision. Under that framework, a plaintiff bringing suit under the retaliation provision must prove that "but-for" his conduct, the retaliation would not have occurred. This is the only interpretation that will give effect to the clear and unambiguous language of the statute. Adopting a lesser standard will not only result is a paradox that directly contradicts Congressional intent, it will also create an unworkable test making it exceedingly difficult for defendants to defend against such retaliation claims.

II. The Motivating-Factor Standard Compromises Defendants' Ability to Erect a Defense and Imposes Substantial Burdens on Defendants.

The legislative decision to require a showing of "but-for" causation in Title VII retaliation claims is deeply rooted in traditional causation philosophy. The but-for causation standard has long served as the preferred standard in tort law. See W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 41, at 266 (5th ed. 1984) (defining but-for causation as: "[t]he

defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it."). Even though other causation standards have emerged over time, the but-for test remains the favored approach. See John D. Rue, *Returning to the Roots of the Bramble Bush: The "But For" Test Regains Primacy in Causal Analysis in the American Law Institute's Proposed Restatement (Third) of Torts*, 71 Fordham L. Rev. 2679 (2003). Indeed, unless specifically indicated otherwise, "but-for causation is part of the plaintiff's burden in all suits under federal law." *Fairley v. Andrews*, 578 F.3d 518, 525-26 (7th Cir. 2009) (construing *Gross*).

A but-for causation standard appropriately accounts for the complicated realities of workplace decision-making, balances the interests of the employer and employee in litigation, and properly limits employer liability to situations where the retaliatory motive actually has a demonstrably negative impact on the employee. Replacing this causation standard with a motivating-factor standard would create such a low test that employers defending against Title VII retaliation claims can be expected to be held liable on many occasions when the claimed retaliatory motive had little or no impact on the adverse employment decision. "'Motivating factor' appears to mean only that the protected characteristic was real and present to help explain the employer's decision, but such a factor need not be significant, much less determinative." Michael J. Zimmer, *Chaos or Coherence: Individual Disparate Treatment Discrimination and the ADEA*, 51 Mercer L. Rev. 693, n. 23 (2000). Thus, a plaintiff could prevail

simply by showing proof that an improper motive was one of multiple reasons for the employment action. Plaintiffs have "the option of not contesting the truthfulness of the stated reason, but instead demonstrating that discrimination was also a motivating factor behind the adverse employment action." Robert M. Weems, *Selected Issues and Trends in Civil Litigation in Mississippi Federal District Courts*, 77 Miss. L.J. 977, 1031 (2008). Defendants, on the other hand, would face the difficulties associated with proving a negative – that they did not retaliate – in order to avoid liability and damages. This is an extremely difficult standard for employers, especially when one considers that in most cases, an employer's decision is based on multiple factors. As Senator Case famously noted during the debate over the Civil Rights Act of 1964, "If anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of." 110 Cong. Rec. 13837-38 (1964). See also David A. Cathcart & Mark Snyderman, *The Civil Rights Act of 1991*, SF41 ALI-ABA 391, 432 (2001) (noting that employment decisions "are almost always mixed-motive decisions turning on many factors.")

Given the many factors that can contribute to any one employment decision, the legislative scheme opted for clarity by employing the traditional "because" language which requires a showing of "but-for" causation in Title VII retaliation cases. Bright-line rules like this offer obvious benefits because they avoid dispute about whether something is inside of the line, which is "bright" or clearly established. That delicate balance is hard to achieve with standards, which can be set too low and result in lots of weak claims, or set too

high and result in violators of a statutory policy doing so with impunity. The legislature makes a policy choice when it selects a bright-line rule over a standard. See e.g. Louis Kaplow, *Rules versus standards: An economic analysis*, 42 Duke L.J. 557, 557 (1992); Kathleen M. Sullivan, *The justices of rules and standards*, 106 Harv. L.R. 22, 26 (1992). Congress made such a choice here when it employed the traditional language "because," which requires a showing of "but-for" causation. Under such a policy, employers who engaged in an adverse action directed at an employee "because of" his exercising his or her Title VII rights, are to be held liable. But one that may be irritated by exercise of Title VII rights but who took action that would have occurred anyway, may not be held liable.

Disregarding the bright-line rule in favor of a standard will create grave difficulties for the businesses and individuals DRI's members are regularly called upon to defend. Even where employers comply with the law, the nature of motives and the motivating – factor causation standard will allow plaintiffs to defeat summary judgment motions in retaliation claims with relative ease:

> While responsible employers will take steps to assure or encourage lawful motivation by participating individuals, it will often be possible for an aggrieved employee or applicant to find someone whose input in the process was in some way motivated by an impermissible factor – a much lighter burden than demonstrating that the forbidden ground of decision was a *determining* factor...Summary judgment will be

> less frequent because the plaintiff's threshold burden is so light.

David A. Cathcart, *supra* (emphasis in original). Because direct evidence is not required in order to obtain a mixed-motive jury instruction, *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 92, 101-102 (2003), plaintiffs can avoid summary judgment simply by a showing of circumstantial evidence – an undemanding burden, to say the least. See *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 400 (6th Cir. 2008) (noting that "[t]his burden of producing some evidence in support of a mixed-motive claim is not onerous and should preclude sending the case to the jury only where the record is devoid of evidence that could reasonably be construed to support the plaintiff's claim."). This means that employers will be forced to spend the resources necessary to litigate a claim at trial, even where the evidence of retaliation is relatively weak. See, e.g., *Holcomb v. Iona College*, 521 F.3d 130, 142 (2d Cir. 2008) (vacating and remanding the district court's grant of summary judgment of plaintiff's Title VII race discrimination claim and holding that even though the plaintiff "has adduced little evidence to suggest that he was terminated *solely* because his wife was black...he needs only to prove that the decision was partly so motivated to prevail on the ultimate merits of his claim."). Employers faced with this situation often choose to settle to avoid the negative publicity of a trial or to save their scarce resources for more productive activities than litigating.

When the standard is lowered to allow for liability on the basis of a mixed motive, the scales will continue to tip in favor of plaintiffs at trial. To illustrate, take

two simple retaliation jury instructions, one which utilizes a "but-for" approach, and the other which employs a "motivating factor" standard:

> Did plaintiff, P, establish by a preponderance of the evidence that defendant, D, retaliated against him because P participated in an investigation, proceeding, or hearing?
>
> Did plaintiff, P, establish by a preponderance of the evidence that his participation in an investigation, proceeding, or hearing was a motivating factor in the decision by defendant, D, to terminate him?

The latter instruction is more favorable to plaintiffs. Stated another way, plaintiffs who must show that the protected characteristic was merely "a motivating factor" in the employer's decision have a much easier burden than those who must satisfy the "but-for" test. Michael J. Zimmer, *The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation*, 30 Ga. L. Rev. 563, 607-08 (1996).

The Third Circuit witnessed this firsthand in the age discrimination context when a jury was given both "but-for" and "motivating factor" instructions in the same case. *Abrams v. Lightolier Inc.*, 50 F.3d 1204 (3d Cir. 1995). *Abrams* was an age discrimination case involving both state and federal claims which proceeded to a jury trial. The jury was instructed that "Abrams had to show that age was *the sole motivating factor* for his discharge" in order to prevail on his federal age discrimination claim brought under the ADEA. *Id.* at 1211 (emphasis in original). However, in

contrast, the jury was instructed that it could find in favor of Abrams on his state-law age discrimination claim by showing that age was "a determinative factor" in the discharge decision. *Id.* Not surprisingly, the jury found that age was not the sole motivating factor for Abrams' termination – thus rejecting his federal claim – but nevertheless concluded that age was a determinative factor in his termination – thus subjecting the employer to back-pay, future losses, and pain and suffering damages under the state-law discrimination act. The lax causation standard for the state-law discrimination claim allowed the jury's verdict to withstand an appeal, even over evidence that Abrams' termination followed a failure to memorialize an oral modification of shipping rates with a third company, which resulted in litigation and cost Abrams' employer nearly one million dollars in settlement and attorney's fees. *Id.* at 1210.

Application of a motivating-factor causation standard can easily result in a windfall to plaintiffs. See Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 Geo. L. J. 489, 512 (2006). Take, for example, an employee who engaged in insubordinate conduct and was terminated. And assume that his employer harbored some retaliatory animus in terminating the employee, but would have terminated the employee regardless based on his insubordinate behavior. Under the "a motivating factor" standard, the employee may prevail in such a case, and the employer could be ordered to reinstate the employee or pay compensatory damage, even though the employee's own misconduct was the reason he was terminated.

The insubordinate employee is therefore placed in a better position than he would otherwise have been. *Id.*

Employers, on the other hand, are often placed in a lose/lose situation. They must choose to either retain the employee who has violated their legitimate rules thus undercutting their enforcement and legitimacy in the workplace, or chance the cost and uncertainties of litigation under a framework that permits an employee to establish a retaliation claim without showing a direct causal connection between his protected status and the injury suffered. For many defendants, the former presents the only economically viable option. This is particularly true where Title VII allows prevailing plaintiffs to recover statutory attorney's fees with relative ease. 42 U.S.C. § 2000e-5(k) ("[i]n an action or proceeding under this subchapter the court in its discretion, may allow the prevailing party...a reasonable attorneys' fee (including expert fees) as part of the costs[.]" In contrast, it is exceedingly difficult for "prevailing defendants," to recoup their attorney's fees. Compare *Newman v. Piggie Park, Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (noting that prevailing plaintiffs "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."), with *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978) (holding that prevailing defendants should receive attorney fees only if the plaintiff's action "was frivolous, unreasonable, or groundless[.]"). The threat of an adverse jury verdict and attorney's fees also places intense pressure on defendants to settle even meritless retaliation claims.

With retaliation claims on the rise, the economic burden on defendants will likely become even more

onerous. Wayne N. Outten et al., *When Your Employer Thinks You Acted Disloyally: The Guarantees and Uncertainties of Retaliation Law,* 693 Prac. L. Inst.-Litig. 151, 153 (2003) (noting that "In part due to the success rate of retaliation claims before juries, more and more plaintiffs are adding retaliation to their discrimination and whistleblower claims."). In fiscal year 2012 alone, Title VII retaliation charges comprised nearly 1/3 of all charges filed with the U.S. Equal Employment Opportunity Commission. U.S. Equal Employment Opportunity Commission, Charge Statistics, FY 1997 Through FY 2012, available at http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited February 28, 2013) (reporting that of the 99,412 total charges filed in FY 2012, 31,208 of them, or 31.4%, were retaliation charges brought pursuant to Title VII). Given the consistent upward trend in Title VII retaliation charges over the past decade (*id.*), it is likely that this number will increase in coming years.

Amicus curiae DRI does not dispute that eliminating retaliation in the workplace is a laudable goal. But this goal must be balanced with equally important goals, including ensuring that employers are not restricted in their decision-making processes because of litigation fears or unnecessarily burdened with the costs of defending or settling meritless lawsuits based on insufficient evidence of retaliation. All of these important considerations, and the interests of both employers and employees, should inform any discussion of the appropriate burden of proof in a retaliation claim brought under Title VII. Congress balanced these competing interests when it enacted a retaliation provision that requires a plaintiff to show

that the retaliation occurred "because" he or she engaged in protected conduct. The Court must give credence to the legislature's word choice, just as it did in *Gross* when it held that "because" as used in the ADEA requires a showing of "but-for" causation. *Gross*, 557 U.S. 176-78. Failure to similarly do so in the Title VII retaliation context will have a harmful impact on the businesses and individuals DRI's members are regularly called upon to defend.

CONCLUSION

The judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 12-484

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OFFICE OF THE

In The
Supreme Court of the United States

UNIVERSITY OF TEXAS
SOUTHWESTERN MEDICAL CENTER,

Petitioner,

v.

NAIEL NASSAR, M.D.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF EMPLOYMENT LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether Title VII's retaliation provision requires a plaintiff to prove that protected conduct was a motivating factor in the decision, with a limitation on damages that applies if a defendant proves that it would have taken the same action regardless, or instead requires a plaintiff to prove "but for" causation (*i.e.*, that an employer would not have taken an adverse employment action "but for" a retaliatory motive).

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INTEREST OF *AMICI CURIAE*[1]

The *Amici* professors have substantial expertise in federal discrimination law. Their expertise thus bears directly on the issues before the Court in this case. The interest of *Amici* in this case is to maintain consistency within Title VII jurisprudence and to advocate for an interpretation of Title VII's retaliation provision that provides adequate protection for individuals who complain about discrimination. A list of signatories may be found in Appendix A.

SUMMARY OF THE ARGUMENT

The analysis in this case is straightforward. The text of Title VII, its consistent interpretation over time, and a long line of cases holding that retaliation is encompassed within discrimination all confirm that a plaintiff can proceed under a motivating factor standard.

A plaintiff may establish an unlawful employment practice under Title VII by demonstrating "race, color, religion, sex, or national origin was a motivating factor for any employment practice." 42 U.S.C. § 2000e-2(m) (2006). This Court consistently

[1] The parties have consented to the filing of this brief. Pursuant to this Court's Rule 37.6, *Amici* state that no counsel for any party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief.

interprets substantive prohibitions on discrimination to encompass prohibitions on retaliation. *Gomez-Perez v. Potter*, 553 U.S. 474, 480-81 (2008); *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 173-74 (2005). This Court has already held that a different aspect of the 1991 amendments that similarly addressed explicitly only substantive discrimination *also encompassed retaliation*. *See CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 446 (2008); Civil Rights Act of 1991, 105 Stat. 1071 (hereinafter "1991 amendments"). Under this well-established principle, § 2000e-2(m) governs retaliation claims.

A motivating factor standard is consistent with the opinion of a majority of Justices in *Price Waterhouse v. Hopkins* and Congress's response to that opinion. 42 U.S.C. § 2000e-2(m); 490 U.S. 228 (1989). Title VII's retaliation provision, 42 U.S.C. § 2000e-3(a) (2006), parallels the primary operative language found in § 2000e-2(a). It prohibits "discrimination" "because" of protected conduct, just as the primary operative language prohibits "discrimination" "because" of certain protected traits. *Price Waterhouse* interpreted the word "because" in Title VII's core prohibition on discrimination, 42 U.S.C. § 2000e-2(a). 490 U.S. at 250. The Court held this term allows a plaintiff to establish that a protected trait was a motivating factor. *Id.* at 240; *id.* at 259 (White, J., concurring in the judgment); *id.* at 261, 263 (O'Connor, J., concurring in the judgment). It is a standard principle of statutory interpretation that identical phrases in the same statute bear a consistent

meaning. *Powerex Corp. v. Reliant Energy Services, Inc.*, 551 U.S. 224, 232 (2007). Title VII's retaliation provision, like its substantive discrimination provision, establishes a motivating factor standard.

Importantly, the motivating factor standard ultimately results in a determination of "but for" cause. The real question in this case is not what the ultimate causation standard should be, but rather, which party bears the responsibility for making certain proofs. If an employer demonstrates that it would have taken the same action notwithstanding retaliatory motives, Title VII precludes most monetary relief, as well as injunctive relief such as reinstatement, hiring, or promotion. 42 U.S.C. §§ 2000e-5(g) & 2000e-5(g)(2)(B) (2006). This result obtains whether applying Title VII's general remedial language or the 1991 amendments.

Petitioner's contention – that the retaliation provision requires the plaintiff prove "but for" causation – is contrary to *Price Waterhouse*, Congress's affirmation of this aspect of *Price Waterhouse*, and the well-established principle that discrimination provisions encompass retaliation. The reasoning in *Gross v. FBL Financial Services*, 557 U.S. 167 (2009), does not apply to the instant case. The Court in *Gross* expressly indicated the result would be different if it were considering the meaning of "because" under Title VII. *Id.* at 174.

The motivating factor standard, with the same decision defense as to remedies, advances Title VII's

underlying objectives. It protects the legitimate interests of employers while furthering the larger commitment to ending employment discrimination. *Cf. McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 361-62 (1995). As this Court has repeatedly explained, Title VII's promise of fair employment practices can only be realized if employees feel secure in filing complaints and serving as witnesses regarding discriminatory conduct. *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006); *see also Thompson v. North American Stainless, LP*, 131 S. Ct. 863, 868 (2011); *see also generally Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn.*, 555 U.S. 271 (2009). It is essential that this Court recognize the harm caused by adverse actions motivated even in part by retaliation; otherwise, reasonable workers will be dissuaded from filing complaints. *Burlington Northern*, 548 U.S. at 57. The motivating factor standard also comports with this Court's frequent exhortation that employees should be encouraged to internally report discrimination, so that employers can investigate and promptly address improper conduct. *See generally Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. Boca Raton*, 524 U.S. 775 (1998).

Petitioner's contention is also problematic because it is premised on drawing a negative inference from Congressional inaction – and as such, it runs counter to a large body of case law establishing that Congressional inaction almost always lacks persuasive significance. *Pension Benefit Guaranty Corp. v.*

LTV Corp., 496 U.S. 633, 650 (1990). Moreover, Petitioner's interpretation is inconsistent with the common law's understanding of causation, which recognizes significant limitations with "but for" cause and embraces multiple causal constructs and orders of proof.

Amici request that the Court interpret Title VII to require a plaintiff to establish that protected activity was a motivating factor in the employment decision. This interpretation affirms the consistent meaning of Title VII's provisions as expressed in Title VII's original language, this Court's precedent, and the 1991 amendments. It is also the standard that best advances the underlying purpose of the retaliation provision.

ARGUMENT

I. The Text of Title VII Applies a "Motivating Factor" Standard to Retaliation Claims.

A. Section 2000e-2(m) Applies to Retaliation Claims.

The only statute at issue in this case is Title VII. The text of that statute provides that plaintiffs can proceed on a retaliation claim under the "motivating factor" standard. 42 U.S.C. § 2000e-2(m). A long line of cases confirms that when Congress uses the word "discriminate" that term encompasses retaliation.

As initially enacted, the primary operative language of Title VII makes it an "unlawful employment practice" for an employer to "discriminate against" an employee "because" of an individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1) (2006). In 1991, Congress re-affirmed that the term "because" in Title VII allows a plaintiff to prevail under a motivating factor standard. 42 U.S.C. § 2000e-2(m) provides:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

As explained more fully below, this provision does not create a new cause of action under Title VII. It simply makes explicit that the word "because" in Title VII allows a plaintiff to proceed under a motivating factor standard. Both before and after 1991, this Court has consistently affirmed that statutory prohibitions on discrimination on the basis of a protected trait *include retaliation claims* stemming from complaints related to such discrimination. Under this well-established principle, § 2000e-2(m) applies to retaliation claims.

In *Gomez-Perez v. Potter*, Justice Alito, writing for the majority, correctly interpreted the ADEA's federal sector provision's prohibition on discrimination on the basis of age to include retaliation. 553

U.S. at 481 ("[W]e interpret the . . . provision's prohibition of 'discrimination based on age,' as likewise proscribing retaliation.") The Court explained that this interpretation flowed naturally from *Jackson v. Birmingham Board of Education*, in which the Court had likewise interpreted Title IX's prohibition on "discrimination" "on the basis of sex" to encompass retaliation. *Id.* at 480-81 ("[W]hen a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional 'discrimination' 'on the basis of sex.'") (quoting *Jackson*, 544 U.S. 167, 173-74 (2005)). Both *Gomez-Perez* and *Jackson* relied on *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), in which the Court had interpreted § 1982's language regarding discrimination to encompass retaliation. Importantly, the Court in *Gomez-Perez* held the prohibition on age discrimination encompassed retaliation even though a different portion of the ADEA, enacted earlier, separately and explicitly addressed retaliation, reasoning that it was "appropriate" and "realistic" to presume that the later Congress expected its prohibition of "discrimination based on age" to be interpreted consistently with *Sullivan*. 553 U.S. at 485 (internal quotes omitted).

This Court *has already held* that a different provision of the 1991 amendments that similarly addressed explicitly only substantive discrimination *also encompassed retaliation*. *See CBOCS West*, 553 U.S. at 446. The issue in *CBOCS* arose from an earlier decision, *Patterson v. McLean Credit Union*, 491 U.S. 164, 180-81 (1989), in which the Court had

held that § 1981 did not permit claims of race discrimination, such as harassment, that post-dated formation of the employment relationship. In the 1991 Act, Congress superseded *Patterson* by amending § 1981 to permit post-formation claims concerning substantive *discrimination*, but the new language did not explicitly address retaliation. Civil Rights Act of 1991 § 101, codified at 42 U.S.C. § 1981(b). The employer in *CBOCS*, like petitioner here, argued that Congress's "failure" to address retaliation should be deemed an explicit choice to exclude retaliation claims from § 1981, pointing out that Congress had included explicit anti-retaliation provisions in other civil rights statutes. *CBOCS*, 553 U.S. at 453-54. This Court, however, emphatically rejected that position. It held that the 1991 Act "nullif[ied] *Patterson*" and that rather than intending to exclude retaliation claims, it was "far more plausible" that Congress "intended . . . to embrace pre-*Patterson* law," including prior decisions permitting retaliation claims – most notably *Sullivan*'s interpretation of § 1982, which was analogous to the language found in § 1981. *Id.* at 454.

The Court has consistently held that prohibitions on substantive discrimination encompass retaliation stemming from complaints regarding such discrimination. Section 2000e-2(m) applies to retaliation claims.

B. *Price Waterhouse* and Title VII's 1991 Amendments Confirm that the Motivating Factor Standard Applies to Retaliation Claims.

Even if this Court were to hold that § 2000e-2(m) does not directly govern the causal standard in retaliation claims, the Court should conclude that retaliation claims brought pursuant to § 2000e-3 are subject to a "motivating factor" standard. This interpretation maintains consistency within Title VII by confirming that the word "because" has the same meaning throughout the statute, a meaning that is driven by *Price Waterhouse v. Hopkins* and Congress's affirmation of the "motivating factor" standard in Title VII's 1991 amendments.

The retaliation provision and the primary discrimination provision use the same words. These provisions make it an "unlawful employment practice" for an employer to "discriminate against" an employee "because" of certain protected traits or because he has engaged in protected activity. 42 U.S.C. §§ 2000e-2(a)(1) & e-3(a).

In *Price Waterhouse*, a majority of the Court held that "because" in Title VII does not require the plaintiff to prove "but for" cause. 490 U.S. at 240 (plurality); *id.* at 259 (White, J., concurring in the judgment); *id.* at 261 (O'Connor, J., concurring in the judgment). Six justices agreed that "because" in Title VII was properly interpreted to require that a plaintiff prove that her status was a "motivating" or "substantial"

factor in the decision and that if she made this showing, the burden would shift to the defendant to prove it would have taken the same action without considering the impermissible characteristic. *Id.* at 245 (plurality); *id.* at 259 (White, J., concurring); *id.* at 261 (O'Connor, J., concurring). This consensus was clear, with the disagreement between the plurality and concurrences turning on whether direct evidence was required to shift the burden. Moreover, this interpretation of "because" was grounded in prior Title VII cases. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973) ("Title VII tolerates no racial discrimination, subtle or otherwise."). It was also consistent with the interpretation of "because" and similar causal language in other employment-related statutes, as well as the burden-shifting regime developed by this Court to resolve First Amendment retaliation claims. *Price Waterhouse*, 490 U.S. at 248-50 (discussing *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977) (First Amendment) and *N.L.R.B. v. Transportation Management Corp.*, 462 U.S. 393, 403 (1983) (National Labor Relations Act)).

Retaliation claims brought pursuant to § 2000e-3 are subject to a "motivating factor" standard. The word "because" in § 2000e-3 of Title VII is the same word found in § 2000e-2 of Title VII that this Court interpreted in *Price Waterhouse v. Hopkins* to include a "motivating factor" standard. Both are in the same statute and both were there when Congress enacted Title VII in 1964. "[I]dentical words and phrases

within the same statute should normally be given the same meaning." *Powerex Corp. v. Reliant Energy Services*, 551 U.S. 224, 232 (2007) (emphasis added); *accord Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003) ("Absent some congressional indication to the contrary, we decline to give the same term in the same Act a different meaning."); *Commissioner v. Lundy*, 516 U.S. 235, 250 (1996) (quoting *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990)) ("[I]dentical words used in different parts of the same act are intended to have the same meaning."). *Price Waterhouse*'s interpretation of "because" in § 2000e-2 applies equally to "because" in § 2000e-3. *Gross* is simply inapposite, because it refused to extend *Price Waterhouse*'s interpretation of "because" in § 2000e-2 to a *different* statute (the ADEA) enacted years later by a different Congress.

Congress's 1991 amendments clarify and codify the Court's prior interpretation of this causal language. In the 1991 amendments, Congress signaled it agreed with the *Price Waterhouse* plurality and concurrences that showing that a protected trait was a "motivating" factor in a decision could be sufficient to establish liability and clarified that either direct or circumstantial evidence could be used to make this showing. *See Desert Palace*, 539 U.S. at 98-99. Congress superseded *Price Waterhouse* only to the extent that *Price Waterhouse* had held that a showing by the defendant that it would have taken the same action even if it had not considered the impermissible factor

was an absolute defense rather than a limitation on remedies.

In so doing, Congress re-instituted a common interpretation of Title VII's pre-existing language.[2] The limitation on damages that Congress added simply makes explicit the result that naturally flows from Title VII's general remedial instruction to provide "appropriate" relief. 42 U.S.C. § 2000e-5(g). In any instance in which an employer proves it would have taken the same action notwithstanding any consideration of an illicit factor, providing the employee with back pay or reinstatement would go beyond "appropriate" relief. *Cf. McKennon*, 513 U.S. at 361-62 ("It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds."). That said, there is an independent and important value in establishing

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[2] Prior to *Price Waterhouse*, several circuits had held that a victim of discrimination could establish liability under Title VII by showing her protected status or conduct was a motivating or substantial factor in a decision, but that she would not be eligible for back pay or reinstatement if the employer could prove that it would have made the same decision absent discrimination. *See, e.g., Bibbs v. Block*, 778 F.2d 1318, 1321-22 (8th Cir. 1985); *Fadhl v. City & County of San Francisco*, 741 F.2d 1163, 1166-67 (9th Cir. 1984); *Patterson v. Greenwood School District 50*, 696 F.2d 293, 295 (4th Cir. 1982); *Day v. Mathews*, 530 F.2d 1083, 1085 (D.C. Cir. 1976). The House Report for the 1991 Act cites to several of these prior decisions with approval and characterizes Congress's action as "restor[ing]" this understanding of the law. H.R. Rep. No. 102-40 (II), at 17-19, 48 (1991).

that the employer should not have allowed protected conduct to play a motivating role in an adverse decision. *Cf. id.* at 361 ("[W]e must recognize the duality between the legitimate interests of the employer and the important claims of the employee who invokes the national employment policy mandated by the Act."). Thus, even if the Court were to conclude that § 2000e-2(m), and the affiliated remedial language in § 2000e-5(g)(2)(B), does not apply directly to retaliation claims, application of Title VII's general remedial language – which unquestionably applies to retaliation claims – would yield the same result. Declaratory relief might be appropriate, but damages and most injunctive relief would not be.

The so-called "mixed-motive" provision and associated remedial limitations should not be interpreted to provide a separate cause of action under Title VII. Nor does it add a "new" causal standard to Title VII. Section 2000e-2(m) explains one evidentiary route that a plaintiff may use to prevail on a Title VII claim. It is best understood as an interpretive gloss that clarifies and confirms the *Price Waterhouse* Court's holding that Title VII's substantive prohibition on discrimination "because" of protected traits, 42 U.S.C. § 2000e-2(a), requires that an employee prove that an illicit factor was a motivating cause of an adverse employment action – and this meaning of "because" should remain consistent in the parallel prohibition on "discrimination" "because" of protected action found in 42 U.S.C. § 2000e-3(a).

As this Court frequently recognizes, *stare decisis* has special force in the statutory interpretation context. *See CBOCS*, 553 U.S. at 451-52 (citing cases). Adhering to past precedent in this case is all the more important, since Congress itself ratified the relevant portion of the prior interpretation. Allowing a plaintiff to prevail if she establishes that her protected activity is a motivating factor in a decision comports with both the text and history of Title VII.

II. A Motivating Factor Standard Is the Most Workable Standard and Properly Balances the Concerns of Employers and Employees.

Applying a motivating factor standard to Title VII discrimination and retaliation cases is far more workable than interpreting retaliation claims to require a showing of "but for" causation. The standard maintains consistency within Title VII and correctly balances the interests of employers and employees.

There is already considerable confusion in the lower courts because the causal standards under the ADEA and Title VII are now different. This causes significant problems any time a plaintiff pleads discrimination under both statutes,[3] or in cases that

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[3] Some courts have taken the (erroneous) position that the necessary implication of *Gross* is that a plaintiff cannot simultaneously challenge a decision under both the ADEA and Title VII because the existence of the Title VII claim suggests that age was not the "but for" cause of the decision. *See, e.g., Culver v.*

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are brought under state laws that prohibit discrimination on the basis of age in the *same statute* as discrimination on the basis of race, sex, religion, or national origin.[4]

Contrary to the petitioner's assertion, interpreting Title VII's retaliation provisions to require a showing of "but for" causation would not clarify the situation – rather, it would make the existing landscape far *more* confusing. This is because Title VII's substantive claims would continue to be governed by the motivating factor standard, and it is common for plaintiffs in Title VII lawsuits to allege violations of both § 2000e-2 and § 2000e-3. If the Court were to hold that retaliation claims require a plaintiff to prove "but for" causation, juries in all such cases would need to be charged on two distinct causal standards. Moreover, they would be tasked with what might well be an impossible exercise of trying to parse the extent to which retaliatory motive, as opposed to substantive discrimination, motivated a particular adverse action. Indeed, in some cases, the

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Birmingham Board of Education, 646 F. Supp. 2d 1270, 1271-72 (N.D. Ala. 2009). Even when courts properly permit both claims to advance, juries in such intersectional cases must be charged on two different causal standards.

[4] *See Smith v. Anchorage School District*, 240 P.3d 834, 842 (Ala. 2010) (refusing to apply *Gross* to state law age claims); *see also, e.g., Baker v. Silver Oak Senior Living Mgmt. Co., L.C.*, 581 F.3d 684, 689-90 (8th Cir. 2009) (same under Missouri law); *Gross v. FBL Financial Services, Inc.*, 588 F.3d 614, 621 (8th Cir. 2009) (same under Iowa law).

same employer action is both discriminatory and retaliatory (*i.e.*, when an employee rejects a sexual advance by a supervisor and is terminated for the refusal).

Requiring a plaintiff to establish "but for" cause will allow some employers who retaliate against employees to escape liability for the retaliation. *See* Martin J. Katz, Gross *Disunity*, 114 Penn State L. Rev. 857, 884 (2010). If an employer has a retaliatory motive, but also has a second sufficient reason for taking an action, the employer will escape liability under a "but for" standard. *Id.* This undermines the effectiveness of Title VII's retaliation provisions.

Petitioner's and its *amici*'s claim that interpreting the retaliation provisions to permit mixed-motive claims would open the floodgates to frivolous claims and nuisance settlements is unsupported. Under a motivating factor standard, plaintiffs are still required to establish that protected activity played a role in an employment decision. If, upon weighing the evidence, a court determines that no reasonable fact finder could conclude that retaliation was a motivating factor in an adverse action, summary judgment would remain appropriate.[5] *Cf. Clark County School*

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[5] Even in cases in which a factual question regarding whether retaliation may have played at least a motivating role in a decision precludes a grant of full summary judgment, a court could grant partial summary judgment as to back pay or reinstatement if an employer demonstrated that there was no

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District v. Breeden, 532 U.S. 268, 273 (2001) (holding summary judgment warranted where adverse action was taken twenty months after protected activity). Indeed, a motivating factor standard has been available under Title VII for more than twenty years; nonetheless, when warranted, courts grant employers' motions for summary judgment, including in cases decided under the motivating factor standard. *See, e.g.*, *Hampton v. Vilsack*, 685 F.3d 1096 (D.C. Cir. 2012); *Wright v. Murray Guard, Inc.*, 455 F.3d 702 (6th Cir. 2006); *cf.* Michael Selmi, *Why are Employment Discrimination Cases So Hard to Win?*, 61 La. L. Rev. 555, 556 (2001) (discussing how courts sometimes suggest that discrimination claims are easy to win, when evidence demonstrates plaintiffs have a low success rate).

Further, unlike traditional tort cases, plaintiffs in retaliation cases are required to prove several additional requirements that limit plaintiffs' ability to sue: a plaintiff must be a protected individual under the statute, 42 U.S.C. § 2000e(f); the defendant must be the kind of entity that is liable under Title VII, 42 U.S.C. § 2000e(b); the plaintiff must establish that her conduct falls within that protected by the statute, 42 U.S.C. § 2000e-3(a); the plaintiff must suffer a type of injury that is compensable, *Burlington Northern*, 548 U.S. at 68; and the plaintiff must meet Title VII's administrative exhaustion

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issue of material fact as to whether it ultimately would have taken the same action anyway.

requirements, including its narrow window for filing administrative charges, 42 U.S.C. § 2000e-5(e)(1). And, as explained above, in any case in which a defendant ultimately establishes that it would have taken the same action notwithstanding any retaliatory motives, remedies would be sharply curtailed.

It is particularly important to recognize the harm that arises when retaliatory motives play a role in an adverse action because this Court has recognized that "[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination." *Crawford*, 555 U.S. at 279 (citing Deborah L. Brake, *Retaliation*, 90 Minn. L. Rev. 18, 20 (2005); *see also* Brake, *supra*, at 37 & n. 58 (compiling studies)). "Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses." *Burlington Northern*, 548 U.S. at 67; *Thompson*, 131 S. Ct. at 868. Moreover, this Court has frequently recognized that Title VII should be interpreted so as to encourage internal reports of discrimination that alert employers to potential problems and allow them to promptly address and end discrimination or harassment. *See Ellerth*, 524 U.S. at 764; *Faragher*, 524 U.S. at 806.

Retaliatory actions by an employer do not simply harm the specific employee involved in the incident. They cause an additional harm in that they can deter other employees from bringing up concerns. An employer thus violates the statute if it retaliates against an employee by taking acts that a "reasonable

employee" would find to be "materially adverse." *Burlington Northern*, 548 U.S. at 68. If an employer can lawfully punish an employee because she made a complaint of discrimination (even if there are additional legitimate justifications for the employer's action), other employees will be further deterred from sharing concerns regarding potentially discriminatory conduct.

III. Petitioner's Argument Rests on an Unwarranted Inference of Congressional "Intent" from Congressional Silence.

Petitioner's argument ignores the plain meaning of Title VII, its consistent interpretation over time, and a long line of cases holding that retaliation is encompassed within discrimination. It also would require the Court to hold that not only did Congress not address retaliation in 1991, but that Congress intended its silence to somehow embrace "but for" cause. This argument is deeply flawed because it is premised on drawing a negative inference from Congressional inaction.

As the Court has explained, "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Pension Benefit*, 496 U.S. at 650 (internal citations omitted); *see also, e.g.*, *DePierre v. United States*, 131 S. Ct. 2225, 2236 n. 13 (2011) ("Ordinarily, we resist

reading congressional intent into congressional inaction.") (internal citations omitted); *Johnson v. Transp. Agency*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting) ("[C]ongressional inaction is a canard."). As explained above, it is reasonable to assume that Congress intended the motivating factor standard enunciated in § 2000e-2(m) to govern retaliation claims. But even if the Court rejects this interpretation, it is undeniable that Congress, in enacting the 1991 Act, did not make any *affirmative* indication that it intended Title VII's retaliation provisions to be governed by a different causation standard than its substantive anti-discrimination provisions. At best, this is a negative inference drawn from Congressional inaction.

To be sure, the challenge of "reading the tea leaves of congressional inaction," *Rapanos v. United States*, 547 U.S. 715, 749 (2006) (plurality), in this case differs from cases in which a bill responding to a prior judicial or administrative interpretation is introduced but not enacted. In those situations, the concerns typically voiced are that many members of Congress may not have known about the relevant decision or that they may have had other higher priorities. *Id.* at 750. Here, members of Congress obviously were aware of *Price Waterhouse*. But that does not resolve what inference to draw from the fact that Congress amended the section containing the substantive discrimination provision actually *interpreted in the prior decision* but did not explicitly amend the retaliation provisions that had not been at

issue in the prior case. Moreover, the actions, and inactions, of the 102nd Congress obviously have no bearing on the intent and purpose of the 88th Congress that enacted § 2000e-3. *Cf. Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 170 (2001) ("The relationship between the actions and inactions of the 95th Congress and the intent of the 92nd Congress . . . [is] considerably attenuated.")[6]

Petitioner claims the "inaction" should be interpreted as a purposive choice to adopt a different causation standard for the retaliation claims than for claims of discrimination based on protected traits. Pet'r Br. 17. But it is at least as plausible that Congress expected that the new language would also govern retaliation claims. Indeed, the committee report suggests that it would be used to reinterpret the causal standard in other similar statutes as well. H.R. Rep. No. 102-40 (II), at 4 (1991) ("The Committee intends that . . . [other laws that have been

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[6] For similar reasons, the fact that bills that would override *Gross* have been proposed but not passed should not be deemed to establish that Congress agrees with *Gross*'s interpretation of the ADEA. Likewise, the fact that some statutes enacted after 1991 explicitly include burden-shifting language like that added to Title VII in 1991 sheds little light on the interpretation of Title VII's earlier language. *Cf. Kasten v. St. Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1332-33 (2011) ("[T]he use of broader language elsewhere *may* mean (1) that Congress wanted to limit the scope of the phrase before us . . . , or (2) that Congress did not believe the different phraseology made a significant difference in this respect.") (emphasis in original).

modeled after Title VII] be interpreted consistently in a manner consistent with Title VII as amended by this Act.") Or it is plausible that Congress assumed and preferred that *Price Waterhouse* – which interpreted the language quite similarly to the 1991 amendments – would continue to control the interpretation of causal language elsewhere in Title VII or other statutes. *Cf. Gross*, 557 U.S. at 185-86 (Stevens, J., dissenting).

Overrides often pose such interpretive dilemmas because the text of the override rarely addresses all potential applications of the precedent to which Congress is responding.[7] Indeed, in recent decisions interpreting the 1991 Act, the Court has adopted a variety of approaches to resolving these thorny questions. Petitioner, of course, points to *Gross*, where the Court deemed the fact that the 1991 Act did not amend the ADEA to be highly significant. Pet'r Br. 22-23. But, as noted above, *CBOCS West* addressed a very similar issue – and in that case the Court reached the opposite conclusion: It deemed insignificant Congress's "failure" to explicitly address retaliation in the override since prior precedent had interpreted retaliation to be implicit in prohibitions on status-based discrimination. 553 U.S. at 454.

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[7] *See generally* Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 Notre Dame L. Rev. 511 (2009); Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 Tex. L. Rev. 859 (2012).

Similar issues were also posed in *Smith v. City of Jackson*, 544 U.S. 228 (2005). In that case, the Court held that the 1991 Act's override of aspects of *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), changed the disparate impact standard for Title VII but that *Wards Cove*'s interpretation remained applicable to the ADEA. *Id.* at 240; *see also Gross*, 557 U.S. at 186 (Stevens, J., dissenting) (arguing reasoning in *Smith* suggested *Price Waterhouse* should have controlled interpretation of the ADEA). In short, recent precedents support several approaches to resolving the interpretive questions posed by this case, confirming the dangers of guessing Congressional "intent" from Congressional inaction.

Likewise, this Court has appropriately emphasized that it is essential to consider context when determining what import to ascribe to differences between generally similar statutory provisions. Thus, while the Court has reasonably concluded that it is sometimes appropriate to "presume[ ] that Congress acts intentionally and purposefully in the disparate inclusion or exclusion" of language, *Rusello v. United States*, 464 U.S. 16, 23 (1983) (internal quotations omitted), it has cautioned that this inference is strongest when applied to "contrasting statutory sections *originally enacted simultaneously* in relevant respects." *Field v. Mans*, 516 U.S. 59, 75 (1995) (emphasis added). Even when addressing sections simultaneously enacted, the Court has observed that where provisions "evolve[ ] separately in the congressional process, only to be passed together at the last

minute," there is a risk that, "in the rough-and-tumble," Congress does not consider the significance of differences among sections. *Lindh v. Murphy*, 521 U.S. 320, 329 (1997). As noted above, when initially enacted, § 2000e-2 and § 2000e-3 were consistent in their structure. The so-called "meaningful" difference at issue in this case is the result of a later amendment made to codify and clarify a judicial interpretation of that common language, an interpretation that is wholly consistent with the common pre-existing language.

Frequently, the Court suggests that if Congress disagrees with statutory interpretation by the courts, it may amend the relevant statute. *Flood v. Kuhn*, 407 U.S. 258, 284 (1972) ("If there is any inconsistency or illogic in all of this, it is . . . to be remedied by the Congress and not by the Court); *see also Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 576 (1982) ("The remedy for any dissatisfaction with the results in particular cases lies with Congress and not with this Court.") This potential for dialogue between the courts and Congress is recognized by the Court and by commentators as essential for maintaining the democratic accountability of statutory law. *See generally* Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 Notre Dame L. Rev. 511, 518-21 (2009) (collecting sources). Already, the efficacy of this dialogue is severely challenged by increasing gridlock in Congress. *See* Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme*

Court, and Congress, 86 U.C.L.A. L. Rev. ___ (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2130190 (finding sharp decrease in the number of overrides enacted since 1991). It could break down entirely if a judicially-created canon of interpretation requires that Congress, if it disagrees with a judicial interpretation of a statute, amend not only the statute actually interpreted in the specific decision but also any and all other statutes, scattered throughout the Code, that include similar language.

IV. Placing the Burden on Plaintiff to Establish "But For" Cause Is Contrary to Common Law Notions of Cause.

One of the petitioner's central arguments is that the word "because" means that the plaintiff must establish "but for" cause, and Petitioner suggests that this interpretation stems from common law understandings of causation. This is incorrect.[8] Common law ideas of factual cause have long embraced numerous causal formulations because of the inherent limits of "but for" cause. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 27 Reporter's Note (2010). In fact, tort law does not rely

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[8] This Court is not bound by tort formulations of causation. *See* Sandra F. Sperino, *The Tort Label*, 65 Fla. L. Rev. ___ (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2200990 (demonstrating that Title VII does not derive from common law torts).

heavily on factual cause when a plaintiff is able to establish intent, as plaintiffs often do in retaliation cases.

The word "because" is not a magic word that signifies "but for" cause to the exclusion of other causal formulations. At common law, the factual cause inquiry considers what connection must exist between the defendant's conduct and the resulting harm. The common law does not rely on "but for" cause as the only way of thinking about the factual cause inquiry. Rather, it has long recognized that "but for" cause is sometimes problematic when more than one actor or factor contributed to the harm. *See, e.g.*, Restatement (Third) of Torts, *supra*, at § 27 (noting that a different factual cause standard exists when multiple sufficient causes exist); *id.* at § 27 Reporter's Note (stating that there is nearly universal recognition that the "but for" standard is inappropriate when multiple sufficient causes exist); Restatement (First) of Torts § 9, cmt. b (1934) (defining a legal cause as one that is a "substantial factor in bringing about the harm"); Restatement (Second) of Torts § 430, cmt. d (1965) (noting there can be more than one source of harm); Restatement (Second), *supra* at § 432 (noting that plaintiff can still establish factual cause when more than one actor causes harm).

Tort law does not respond to the shortcomings of "but for" cause by denying liability entirely. Rather, tort law contains a robust idea of factual cause that incorporates varying standards and evidentiary orders to accommodate the underlying cause of action

and to apportion responsibility for harm appropriately. *See, e.g.*, *Summers v. Tice*, 199 P.2d 1, 3 (Cal. 1948); *Sindell v. Abbott Laboratories*, 607 P.2d 924, 928 (Cal. 1980) (discussing ways that plaintiff could recover despite being unable to establish which defendant caused plaintiff's harm); Restatement (Third) of Torts, *supra*, at § 27.

One common scenario where "but for" cause yields unsatisfactory results is when an event is overdetermined; *i.e.*, when two separate physical forces create an injury and either alone would be sufficient to cause the injury. *See id.*; Mark Bartholomew & Patrick F. McArdle, *Causing Infringement*, 64 Vand. L. Rev. 675, 722 (2011). This idea is sometimes referred to as multiple, sufficient causes. Under a "but for" analysis in this situation, a plaintiff would not be able to prevail on a retaliation claim if the reason for the employment decision is overdetermined – if the employer terminated the employee for both a retaliatory reason and a reason acceptable under the at-will doctrine, and either reason, standing alone, would have led to the termination. Tort law rejects "but for" cause in multiple, sufficient cause cases and allows the plaintiff to establish that either sufficient cause created the injury. Restatement (Third) of Torts, *supra*, at § 27. This standard is akin to the plaintiff's initial burden in the motivating factor analysis adopted in *Price Waterhouse* and the 1991 amendments to Title VII.

The motivating factor analysis, and the related shift of the burden to the defendant to prove that it

would have taken the same action anyway, is also superior because it understands that plaintiffs may not have the best access to information regarding why an employer made a decision. This is especially true in today's work environment in which multiple individuals may contribute to an employment decision. The motivating factor standard does require the plaintiff to show that retaliation played a role in a decision. However, it also recognizes that the employer is the entity that has the best access to evidence related to its decisions. *Summers*, 199 P.2d at 3 (shifting burden to defendants to show which one caused the harm); *Sindell*, 607 P.2d at 928.

Retaliation cases present even more compelling reasons in support of a motivating factor standard than traditional tort cases because they often turn on intent. The tort causation analysis developed in negligence cases relating to physical events, such as car and train accidents, in which it is comparatively easy to determine what caused injury. By contrast, in retaliation cases, courts are often asked to determine animus or intent contained within the mind of a decisionmaker or set of decisionmakers. It may be difficult to separate retaliatory from non-retaliatory motives, as people often act for more than one reason.

Tort law de-prioritizes the factual cause inquiry when a defendant intends a particular action. Restatement (First) of Torts, *supra*, § 279, cmt. c (explaining that the definition of cause changes depending upon whether the tort is negligence or an intentional tort); *id.* at § 280. In these cases,

requiring the plaintiff to establish "but for" cause is unnecessary because evidence of intent diminishes the need for a strong causal standard. *See, e.g.*, Restatement (Second) of Torts, *supra*, § 13 (describing the elements of battery without discussing causation). The motivating factor standard, with appropriate reductions in damages if an employer proves it would nonetheless have taken the same action, is far more reflective of common law approaches to causation than a "but for" standard.

V. The Question Presented Is Overbroad and Contains False Assumptions Suggesting that "But For" Causation Means Sole Cause.

Petitioner's framing of the question presented is problematic in two important respects. First, Petitioner asks the Court to apply *Gross* to all statutes that are "similarly worded" to Title VII, both within and outside the field of employment discrimination law. Applying *Gross* so broadly would radically alter existing understandings of the effect of Congressional silence and principles regarding how courts determine which statutes should be interpreted *in pari materia*. Second, the question presented implies that there is always a dichotomy between multiple motives and "but for" cause. It improperly equates "but for" cause with sole causation.

Petitioner never fully defines the statutes that it considers to be "similarly worded" to the primary

operative language of Title VII. The extreme breadth of the question presented is demonstrated by even a quick list of the provisions and statutes – scattered throughout the Code and under the jurisdiction of numerous different Congressional committees – that prohibit conduct "because" of an individual's status or actions or that use similar causal language. This could include the criminal bribery statute, 18 U.S.C. § 201(c)(1) (2006) (prohibiting receipt of anything of value "because" of official acts); the Immigration Reform and Control Act, 8 U.S.C. § 1324b(a)(1)(A)-(B) (2006) (prohibiting discrimination against an employee "because" of national origin or citizenship status); the Family Medical Leave Act, 29 U.S.C. § 2615(b) (2006) (prohibiting discrimination "because" of protected conduct); the False Claims Act, 31 U.S.C. § 3730(h)(1) (prohibiting discrimination "because" of protected conduct); the Occupational Safety and Health Act, 29 U.S.C. § 660(c)(1) (2006) (prohibiting discrimination "because" of protected conduct); and the Asbestos Hazard Emergency Response Act, 15 U.S.C. § 2651 (2006) (prohibiting discrimination "because" an employee made a complaint). It could also reach statutes far outside the employment context, such as Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2006) (prohibiting programs receiving federal financial assistance from discrimination "on the ground" of various traits); Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3604, 3605, 3606 (2006) (prohibiting various kinds of housing discrimination "because" of various traits); and Title IX of the Education Amendments Act of 1972, 20

U.S.C. § 1681 (2006) (prohibiting discrimination "on the basis of" sex by education programs receiving federal financial assistance).

Many of these statutes are structured differently than the ADEA and Title VII, use different causal language, and do not derive solely or primarily from Title VII or the ADEA. It would stretch a Congressional silence argument to absurdity to suggest that Congress somehow intended to express its desires about causation in all then-existing and future statutory regimes when it amended Title VII in 1991.[9]

The question presented is also confusing in that it suggests that a plaintiff cannot prevail under a "but for" cause standard when there are mixed motives. The question presented thus seems to equate "but for" cause with sole causation. *See also* Pet'r Br. 29 (arguing for a sole causation standard). Congress

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[9] Using reasoning from *Gross* to resolve questions under the Americans with Disabilities Act ("ADA") would be highly problematic. 42 U.S.C. § 12101 *et seq.* (2006), as amended. Contrary to petitioner's assertions, the ADA's primary provision does not use the same words as the ADEA. The ADA contains a multi-part definitional section that explains what Congress meant in the main operative language, and these definitions do not rely on notions of "but for" cause. Rather, they incorporate such varied concepts as a failure to make reasonable accommodations or denial of a job or benefits to an individual because of her relationship with an individual with a disability. *Id.* at § 12112(b). Moreover, the ADA explicitly incorporates Title VII's remedial provisions, including the modification of those provisions made in the 1991 Act. *Id.* at § 12117.

explicitly rejected a sole causation standard under Title VII. *See Price Waterhouse*, 490 U.S. at 241 n. 7.

"But for" cause means that the cause was a necessary condition of the harm. *See, e.g.*, Restatement (Third) of Torts, *supra*, § 26 cmt. b. An act can be a necessary condition of harm even when multiple acts are necessary to cause the harm. *Id.* at cmt. b & c. Take the following example. Assume that a supervisor was considering firing an employee for some kind of mistake but was reluctant to terminate the employee because in other respects she had been a fine worker. The supervisor then learns that the employee submitted a discrimination complaint against the supervisor, and this news gives the supervisor the impetus to terminate the employee. Even though there are potentially two motives at issue, the terminated employee may well be able to establish that her protected activity was a "but for" cause of her termination. *Cf. id.* at cmt. b ("An act can also be a factual cause in accelerating an outcome that otherwise would have occurred at a later time."). In such an instance, she should be able to recover on a retaliation claim even though her mistake may also have been a factor in the decision to terminate her. But for her protected conduct, she would not have been terminated.

Even if this Court were to interpret Title VII's retaliation provisions to require a plaintiff prove "but for" causation, the Court should make clear that this does not require a plaintiff prove that retaliation was the *sole* cause of any adverse action against her. Since

an employer would in numerous instances be able to identify at least some infraction that might justify an adverse action against an employee, a sole causation standard would render the retaliation provisions almost meaningless.

CONCLUSION

For these reasons, the Court should affirm the judgment below.

Respectfully submitted,

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No. 12-484

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Supreme Court of the United States

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER,

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND AMERICAN HOSPITAL ASSOCIATION IN SUPPORT OF PETITIONER

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BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND AMERICAN HOSPITAL ASSOCIATION IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council (EEAC), National Federation of Independent Business (NFIB) Small Business Legal Center and American Hospital Association (AHA) respectfully submit this brief *amici curiae* with the consent of the parties. The brief supports the position of Petitioner before this Court in favor of reversal.[1]

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 250 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents over 350,000 member businesses nationwide. The NFIB Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent setting cases that will have a critical

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no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

impact on small businesses nationwide, such as the case before the Court in this action.

The AHA is a national not-for-profit association that represents the interests of approximately 5,000 hospitals, health care systems, networks, and other health care providers, as well as 37,000 individual members. It is the largest organization representing the interests of the Nation's hospitals. The members of the AHA are committed to finding innovative and effective ways of improving the health of the communities they serve. The AHA educates its members on health care issues and trends, and it advocates on their behalf in legislative, regulatory, and judicial fora to ensure that their perspectives and needs are understood and addressed. One way in which the AHA promotes the interests of its members is by participating as *amicus curiae* in cases with important and far ranging consequences for their members.

Some or all of *amici's* members are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, as amended, and other federal employment-related laws and regulations. As employers, and as potential defendants to claims asserted under these laws, *amici* have a substantial interest in the issue presented in this case regarding the availability of the mixed-motive standard of proof in Title VII retaliation and non-Title VII discrimination cases, in light of this Court's decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009).

Because of their interest in the application of the nation's fair employment laws, *amici* have filed numerous briefs as *amicus curiae* in cases before this

Court and the courts of appeals involving the proper construction and interpretation of Title VII and other federal laws.[2] Thus, *amici* have an interest in, and a familiarity with, the issues and policy concerns involved in this case.

Amici seek to assist the Court by highlighting the impact its decision may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant matters that have not already been brought to its attention by the parties. Because of their experience in these matters, *amici* are well-situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Respondent Naiel Nassar began his employment with Petitioner, the University of Texas Southwestern Medical Center (UTSW), in 1995. Pet. App. 2. After taking three years off, he returned to UTSW in 2001 as Assistant Professor of Internal Medicine and Associate Medical Director of the Clinic. *Id.* His immediate supervisor was Dr. Phillip Keiser, who in turn reported to Dr. Beth Levine, Chief of Infectious Disease Medicine. *Id.*

Nassar complained that he allegedly was being harassed by Levine, and sought transfer to another role that would take him out of her line of supervision. Pet. App. 4. He stepped down from his

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[2] *See, e.g., Gross v. FBL Fin. Svcs., Inc.*, 557 U.S. 167 (2009); *Crawford v. Metro. Gov't of Nashville*, 555 U.S. 271 (2009); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008); *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

faculty post when he received a job offer working for an affiliated clinic (Parkland), effective July 10, 2006. Pet. App. 5. On July 3, he submitted a letter of resignation in which he asserted that his "primary reason" for resigning was because of Levine's harassing and discriminatory behavior. *Id.* Shortly thereafter, Parkland withdrew its job offer. *Id.*

Nassar brought suit in federal court, accusing UTSW of orchestrating Parkland's refusal to hire him in retaliation for his discrimination complaints, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a). Pet. App. 6. At trial, Nassar presented evidence suggesting that Dr. Gregory Fitz, UTSW's Chair of Internal Medicine and Levine's immediate supervisor, was upset by the accusations contained in Nassar's resignation letter, and set out to persuade Parkland not to hire him. Pet. App. 5. For its part, UTSW presented evidence that Parkland was contractually bound to hire only UTSW faculty to work in its clinic, and that Fitz was opposed to Nassar's placement there as early as April 2006 – well prior to his resignation. Pet. App. 4-5.

The jury found that UTSW constructively discharged and retaliated against Nassar, and awarded him $3.4 million in back pay and compensatory damages. Pet. App. 6-7. After the trial court denied its post-trial motion for judgment as a matter of law, UTSW appealed to a three-judge panel of the Fifth Circuit, arguing among other things that Nassar failed to prove that retaliation was the but-for cause of Parkland's decision not to hire him. Pet. App. 7.

Citing to its 2010 ruling in *Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010) – which held that the mixed-motive framework is available to Title VII retaliation plaintiffs, even after this Court's 2009

ruling in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009) – the panel, without further analysis, affirmed the district court's judgment regarding liability for retaliation. Pet. App. 12. After its requests for rehearing and rehearing *en banc* were denied, UTSW filed a Petition for a Writ of Certiorari, which this Court granted on January 18, 2013. 133 S. Ct. 978 (2013).

SUMMARY OF ARGUMENT

The decision below, which relieves plaintiffs suing under Section 704(a) of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, of the burden of proving that unlawful retaliation was *the* reason for the challenged employment action, conflicts with the plain text of the statute and is irreconcilable with this Court's decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009). Therefore, it must be reversed.

Title VII contains two distinct workplace protection provisions: Section 703(a)(1), 42 U.S.C. § 2000e-2(a)(1), prohibits employers from discriminating against any applicant or employee because of race, color, religion, sex or national origin, while Section 704(a), 42 U.S.C. § 2000e-3(a), makes it unlawful to retaliate against such an individual "because he has opposed any practice made an unlawful employment practice by this [subchapter], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this [subchapter]." Unlike substantive discrimination claims brought under Section 703(a)(1), Section 704(a) retaliation claims are not subject to the motivating factors burden-shifting scheme added

to the statute when Congress enacted the Civil Rights Act of 1991 (CRA), Pub. L. No. 102-166 (1991).

Specifically, CRA Section 107 provides that after a plaintiff "demonstrates that race, color, religion, sex, or national origin was a motivating factor" – along with other, legitimate considerations – for "any employment practice," 42 U.S.C. § 2000e-2(m), the employer may limit its liability significantly for damages stemming from the discrimination by demonstrating that it "would have taken the same action in the absence of the impermissible motivating factor ...." 42 U.S.C. § 2000e-5(g)(2)(B). Plainly absent is any reference to "retaliation" or to 42 U.S.C. § 2000e-3(a), even though the CRA amended that provision in other important ways – including to provide for a right to jury trials and to authorize awards of compensatory and punitive damages. 42 U.S.C. §§ 1981a(a)(1), (b)(3)(D).

Accordingly, Title VII retaliation plaintiffs must prove, by a preponderance of the evidence, that they were subjected to a materially adverse employment action "because of" their statutorily-protected conduct – just as is the case for claims of intentional discrimination under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.* The pertinent section of the ADEA prohibits discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age." 29 U.S.C. § 623(a)(1). Like Section 704(a), the ADEA never has been amended to incorporate the motivating factor test applicable to Title VII discrimination claims.

This Court's decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), which held that

the motivating factor test does not apply to claims brought under the ADEA, thus casts considerable doubt as to its availability under Section 704(a), or any statute that does not expressly allow for recovery based on motivating factors. As the Court observed in *Gross*, "We cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally." 557 U.S. at 174. Because the court below disregarded both the plain text of Title VII, as well as this Court's interpretation of identical language in *Gross*, its decision should be reversed.

Strict adherence to the actual text of Title VII and to *Gross* is especially important now in light of the substantial increase over the last several years in Title VII retaliation litigation. *See, e.g.*, Brief *Amici Curiae* of the Equal Employment Advisory Council and Chamber of Commerce of the United States of America in Support of Petition for Writ of Certiorari, at 17. Permitting Title VII retaliation plaintiffs to proceed under a motivating factor framework in the absence of express statutory authorization would encourage frivolous lawsuits, only adding to an already heavy litigation burden placed on defendants and the courts.

ARGUMENT

I. THE FIFTH CIRCUIT'S RULING BELOW, WHICH PERMITS TITLE VII PLAINTIFFS TO PREVAIL AND RECOVER DAMAGES EVEN WHERE ALLEGED RETALIATION WAS BUT ONE OF MANY FACTORS CAUSING THE CHALLENGED EMPLOYMENT ACTION, IS DIRECTLY CONTRARY TO TITLE VII AND THIS COURT'S DECISION IN *GROSS*

A. The Plain Text Of Title VII Makes The Mixed-Motive Analysis Available Only In Cases Of Discrimination Because Of Race, Color, Religion, Sex Or National Origin

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, contains two distinct provisions making certain employment practices unlawful. "The antidiscrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status," *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53, 63 (2006) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-01 (1973)), whereas the anti-retaliation provision "seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." *Id.*

As this Court has observed, Title VII's "substantive provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The antiretaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct." *Id.* Specifically, Section 703(a)(1) provides that:

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1). Separately, Section 704(a) makes it unlawful:

> for an employer to discriminate against any of his employees or applicants for employment ... because he has opposed any practice made an unlawful employment practice by this [subchapter], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this [subchapter].

42 U.S.C. § 2000e-3(a).

In *Price Waterhouse v. Hopkins*, this Court ruled that where a plaintiff proves that gender, along with other legitimate factors, played "a motivating part" in an employment decision, the plaintiff has shown that the decision was "because of" sex in violation of Title VII's anti-discrimination provision. 490 U.S. 228, 250 (1989). Under those circumstances, the employer can avoid liability only if it proves, by a preponderance of the evidence, that it would have made the same decision without considering the protected characteristic. *Id.* at 249.

This method of proof has come to be referred to as the "mixed-motive[]" analysis, *id.* at 246, which recognizes the relatively rare circumstance in which there exists compelling, "smoking gun" evidence of discrimination, yet the employer contends that it

would have taken the same employment action in any event. *Id.* at 247. Under that test, if the plaintiff persuades the trier of fact that the employer actually considered an illegitimate factor, the burden of persuasion shifts to the employer to prove that it would have reached the same decision based solely on legitimate factors. *Id.* at 246.

Two years after this Court decided *Price Waterhouse*, Congress enacted the Civil Rights Act of 1991 (CRA), Pub. L. No. 102-166 (1991), which established a "motivating factor" test applicable to mixed-motive cases brought under Title VII's nondiscrimination provision. Specifically, Section 107 of the 1991 Act provides that after a plaintiff "demonstrates that race, color, religion, sex, or national origin was a motivating factor" – along with other, legitimate considerations – for "any employment practice," 42 U.S.C. § 2000e-2(m), the employer may limit its liability significantly for damages stemming from the discrimination by demonstrating that it "would have taken the same action in the absence of the impermissible motivating factor ...." 42 U.S.C. § 2000e-5(g)(2)(B).

"Noticeably absent from this provision is a reference to retaliation claims," however. *McNutt v. Bd. of Trustees*, 141 F.3d 706, 707 (7th Cir. 1998). In fact, unlike Title VII's substantive discrimination provision, its anti-retaliation clause never was amended to incorporate a motivating factor test, and thus is similar to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, which makes it unlawful for an employer to "fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment,

because of such individual's age." 29 U.S.C. § 623(a)(1) (emphasis added).

"[T]here is a longstanding principle that different language implies different meaning. This is a jumping off point rather than a rigid rule; a statute's context (both linguistic and historical) may show that different verbal formulations have the same meaning. We must start, however, with the enacted language ...." *Neal v. Honeywell Inc.*, 33 F.3d 860, 863 (7th Cir. 1994) (citation omitted), *overruled on other grounds*, *Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409 (2005). Since the "enacted language" of Title VII's retaliation clause limits liability to actions taken "because of" an individual's protected activity, the court below improperly allowed the plaintiff to proceed – and recover substantial damages – under a mixed-motive theory.

Congress's decision to limit the motivating factor test to discrimination claims plainly was deliberate, as is evidenced by the fact that it applied other parts of the 1991 CRA broadly to both types of claims. In particular, at the same time as it codified the motivating factor test in claims brought under Section 703(a)(1), Congress also amended Section 703(a)(1) *and* Section 704(a), as well as the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*, to authorize awards of compensatory and punitive damages up to a maximum of $300,000 for employers with over 500 employees. 42 U.S.C. §§ 1981a(a)(1), (b)(3)(D). Congress's decision to apply some of the CRA's enhanced remedial provisions to Title VII's retaliation clause, but not the section that imposes liability based on motivating factors, thus cannot be said to have been inadvertent or unintentional.

On the contrary, where "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citations omitted); *see also Gross v. FBL Fin. Services., Inc.*, 557 U.S. 167, 174 (2009) ("When Congress amends one statutory provision but not another, it is presumed to have acted intentionally").

There are a number of federal statutes, including many whistleblower laws, in which Congress expressly incorporated a demonstrably lower standard of proof than the but-for causation standard that applies to Title VII retaliation and other non-Title VII discrimination claims. *See, e.g.*, Surface Transportation Assistance Act (STAA), Pub. L. No. 97- 424, 96 Stat. 2097 (1983); Whistleblower Protection Act of 1989 (WPA), 5 U.S.C. § 1221 *et seq.*; Financial Institution Regulator Whistleblower Protection Act of 1993, 12 U.S.C. § 1831j(a)(1); Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21), Pub. L. No. 106-181, 114 Stat. 61 (2000); Sarbanes-Oxley Act of 2002 (SOX), Pub. L. No. 107-204, 116 Stat. 745 (2002); and National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, 126 Stat. 1632 (2013). The Whistleblower Protection Act of 1989 (WPA), 5 U.S.C. §§ 1221 *et seq.*, for instance, authorizes the Merit Systems Protection Board to award relief to a federal employee or applicant who has proven that his or her whistleblower activities were "a contributing factor in the personnel action through circumstantial evidence ...." 5 U.S.C. § 1221(e)(1). In such a case, the district court applies a two-part analysis:

> (1) the plaintiff must establish a prima facie case of retaliation by showing that his or her disclosures were a contributing factor in adverse employment actions; then (2) the burden of persuasion shifts to the defendant to demonstrate by the high standard of clear and convincing evidence that it would have made the same employment decision in the absence of plaintiff's disclosures.

Rouse v. Farmers State Bank, 866 F. Supp. 1191, 1207-08 (N.D. Iowa 1994) (emphasis omitted); *see also Marano v. Dep't of Justice*, 2 F.3d 1137, 1141 (Fed. Cir. 1993).

Both the Financial Institution Regulator Whistleblower Protection Act of 1993, 12 U.S.C. § 1831j(a)(1), and the National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, 126 Stat. 1632 (2013), expressly incorporate the WPA's contributing factor proof scheme. 12 U.S.C. § 1831j(f).[3] Similarly, the whistleblower provisions of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C. § 1514A, and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. § 5567, also merely require proof that the complainant's protected activity was a contributing factor in the adverse employment action. *See Bechtel v. Admin. Review Bd.*, __ F.3d __, 2013 U.S. App. LEXIS 4539 (2d Cir. Mar. 5, 2013); *see also* Uniformed Services Employment and Reemployment

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[3] The WPA was an amendment to the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978), which, while prohibiting retaliation against whistleblowers, placed a more onerous burden of proof on plaintiffs. When Congress enacted the WPA in 1989, it "substantially reduc[ed] a whistleblower's burden to establish his case ...." *Marano v. Dep't of Justice*, 2 F.3d 1137, 1141 (Fed. Cir. 1993).

Rights Act (USERRA), 38 U.S.C. § 4311(c)(1), as amended (employer acts unlawfully if plaintiff's "membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action").

The Third Circuit recently had occasion to examine the relatively light burden that employees bear in some whistleblower cases, there under the Federal Rail Safety Act (FRSA), 49 U.S.C. §§ 20101 *et seq.* *Araujo v. N.J. Transit Rail Operations, Inc.*, __ F.3d __, 2013 U.S. App. LEXIS 3380, at *15-*20 (3d Cir. Feb. 19, 2013). It observed:

> [T]he ... burden-shifting framework that is applicable to FRSA cases is much easier for a plaintiff to satisfy than the *McDonnell Douglas* standard. As the Eleventh Circuit noted in a case under the Energy Reorganization Act, a statute that uses a similar burden-shifting framework, "[f]or employers, this is a tough standard, and not by accident" ... because Congress intended for companies in the nuclear industry to "face a difficult time defending themselves," due to a history of whistleblower harassment and retaliation in the industry.
>
> * * *
>
> The underreporting of railroad employee injuries has long been a particular problem, and railroad labor organizations have frequently complained that harassment of employees who reported injuries is a common railroad management practice. ... We simply note this history to emphasize that, as it did with other statutes that utilize the "contributing factor" and "clear and convincing

> evidence" burden-shifting framework, Congress intended to be protective of plaintiff-employees.

Id. at *17-*20 (citations and footnote omitted).

The plain text and legislative history of these laws demonstrate clearly that when Congress seeks to lower a plaintiff's burden of proof, it has no difficulty expressly incorporating language to that effect into the subject statute. Furthermore, as the Seventh Circuit has observed:

> [T]here is no rule that all statutes addressing related topics mean the same thing–let alone that all statutes should receive the reading most favorable to whistleblowers. Why not treat all whistleblower laws as identical to the statute most favorable to employers, or treat all as if they were right in the middle? Instead there is a longstanding principle that different language implies different meaning.

Neal v. Honeywell Inc., 33 F.3d at 863.

Because Title VII explicitly makes the motivating factor test available only to claims of *discrimination* on the basis of race, color, religion, sex or national origin under Section 703, not to causes of action for unlawful *retaliation* under Section 704, there is no basis for importing the test into the retaliation context. Therefore, it was improper for the court below to allow the plaintiff to proceed on that basis, and in doing so to relieve him of the ultimate burden of proving but-for causation.[4]

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[4] If the plain text of § 107 were not enough, the legislative history of the CRA confirms that the motivating factor amendment was intended to apply only to Title VII discrimination, not retaliation, claims. In a section-by-section analysis of

B. *Gross* Casts Considerable Doubt On, If Not Forecloses Entirely, The Availability Of The Mixed-Motive Theory Where The Underlying Statute Does Not Expressly Authorize It

> As in all cases involving statutory construction, our starting point must be the language employed by Congress, and we assume that the legislative purpose is expressed by the ordinary meaning of the words used. Thus [absent] a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.

Am. Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982) (quotations and citations omitted); *see also Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 175-76 (2009); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 458 (2008) (Thomas, J., dissenting) ("It is unexceptional in our case law that '[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose'") (citations omitted).

In *Gross*, this Court ruled that the term "because of" age as used in the ADEA means "that age was the 'reason' that the employer decided to act." 557 U.S. at 175-76. And since the statute does not permit

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the bill that was to become the 1991 CRA, for instance, Senator Dole described § 107 as "allow[ing] the employer to be held liable if discrimination was a motivating factor in causing the harm suffered by the complainant . . . [but if] it would have taken the same employment action absent consideration of race, sex, color, religion, or national origin, the complainant is not entitled to reinstatement, backpay or damages." 137 Cong. Rec. S15,476 (daily ed. Oct. 30, 1991).

recovery based on the existence of both permissible and impermissible reasons, as Title VII does, the Court concluded that ADEA plaintiffs alleging intentional age discrimination may not proceed under a mixed-motive theory. Rather, such plaintiffs retain the ultimate burden of proving that the challenged employment action would not have occurred but-for the employer's unlawful consideration of age. *Id.*

In doing so, the Court implicitly rejected the notion that simply because the ADEA and Title VII share a common goal – the elimination of workplace discrimination – they both should be construed to permit recovery on a mixed-motive theory, pointing out that when Congress added the motivating factor test to Title VII in 1991, it did so only with respect to claims of unlawful discrimination based on race, color, religion, sex or national origin. Because the plain text of the ADEA does not authorize mixed-motive claims, and "Congress neglected to add such a provision to the ADEA when it amended Title VII to add §§ 2000e-2(m) and 2000e-5(g)(2)(B), even though it contemporaneously amended the ADEA in several ways," the Court found no basis for permitting ADEA plaintiffs to proceed under such a theory. *Gross*, 557 U.S. at 174 (citations omitted). It observed, "We cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally." *Id.*

Properly applied, *Gross* therefore must foreclose mixed-motive recovery in Title VII retaliation claims, or for that matter in any other non-Title VII discrimination suit in which the underlying statute does not expressly contain a motivating factor burden-shifting

scheme. As the Seventh Circuit reasoned, "Although the *Gross* decision construed the ADEA, the importance that the Court attached to the express incorporation of the mixed-motive framework into Title VII suggests that when another anti-discrimination statute lacks comparable language, a mixed-motive claim will not be viable under that statute." *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 961 (7th Cir. 2010); *see also Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 319 (6th Cir. 2012) ("Shared statutory purposes do not invariably lead to shared statutory texts, and in the end it is the text that matters") (*en banc*).

Like the ADEA, Title VII's retaliation provision benefited from some, but not all, of the 1991 Amendments: while plaintiffs suing under Section 704 were given the right to a jury trial and could recover compensatory and punitive damages, Congress saw fit not to allow them to establish liability utilizing a mixed-motive theory. Accordingly, as this Court concluded with respect to the ADEA in *Gross*, Section 704(a)'s "because of" language must be construed as requiring retaliation plaintiffs to prove that they suffered a materially adverse employment action directly as a result of, and for no reason other than, their statutorily-protected conduct.

II. PERMITTING NON-TITLE VII DISCRIMINATION PLAINTIFFS TO PROCEED UNDER A MOTIVATING FACTOR FRAMEWORK WOULD ENCOURAGE FRIVOLOUS LAWSUITS, THUS INCREASING SUBSTANTIALLY AN ALREADY HEAVY LITIGATION BURDEN PLACED ON DEFENDANTS AND THE COURTS

An employer should not be held legally responsible for alleged workplace retaliation – and subject to liability for compensatory and punitive damages – where the plaintiff is unable to establish a direct, causal connection between his protected conduct and a materially adverse employment action. If the motivating factor test were applied to retaliation cases, any employee who ever (1) has participated as a witness in an internal EEO complaint, external EEOC charge investigation, or lawsuit; (2) has assisted another to complain; (3) personally filed formal or informal charges; or (4) was (or is) "close" to someone who has engaged in such protected conduct would, as a practical matter, be able to avoid virtually any adverse employment action simply by claiming that both legitimate and unlawful retaliatory motives were at play. Such an expansive interpretation of Section 704(a) would greatly impair the ability of employers to take legitimate action against any employee without first ruling out, in every instance, the possibility that the individual (or someone with whom he or she has a close personal relationship) may have engaged in protected activity at some point in the past.

In light of the substantial increase in Title VII retaliation charge activity and litigation over the last several years, the possibility that many, if not most,

employees at some point will have complained about EEO violations (or been close to others who have) is far from remote. As Justice Alito observed in *Crawford v. Metropolitan Government of Nashville*, "[t]he number of retaliation claims filed with the EEOC has proliferated in recent years." 555 U.S. 271, 283 (2009) (Alito, J., concurring); *see also* Brief *Amici Curiae* of the Equal Employment Advisory Council and Chamber of Commerce of the United States of America in Support of Petition for Writ of Certiorari, at 17.

The availability of the mixed-motive framework likely will preclude summary judgment in most cases, ultimately making it far easier to establish liability for unlawful retaliation. And opportunistic plaintiff's counsel eager to win their cases – or negotiate generous settlement packages with "deep-pocketed" corporate defendants – will plead every conceivable retaliation claim under both a single-motive and a mixed-motive theory, so as to benefit from not having to bear the ultimate burden of proof in cases in which their pretext evidence is weak or nonexistent.

As one commentator observed:

> Employment decisions ... are almost always mixed-motive decisions turning on many factors. While responsible employers will take steps to assure or encourage lawful motivation by participating individuals, it will often be possible for an aggrieved employee or applicant to find someone whose input into the process was in some way motivated by an impermissible factor–a much lighter burden than demonstrating that the forbidden ground of decision was a determining factor. ... Summary judgment will be less

> frequent because the plaintiff's threshold burden is so light.

David A. Cathcart & Mark Snyderman, *The Civil Rights Act of 1991*, SF41 ALI-ABA Course of Study 391, 432 (Mar. 1, 2001) (emphasis omitted). Permitting retaliation plaintiffs to pursue claims under a mixed-motive theory, a significantly less onerous standard that shifts the burden of proof to the employer upon a showing by the employee that both lawful and allegedly retaliatory considerations played a role in the adverse action, thus would encourage the filing of potentially frivolous, preemptive lawsuits, increasing substantially an already heavy litigation burden placed on defendants and the courts.

Furthermore, frivolous mixed-motive claims divert attention and resources away from the development of proactive corporate nondiscrimination and anti-retaliation measures. "Excessive discrimination claims bind employers by forcing them to divert their resources, thereby reducing their efficiency." Joseph J. Ward, *A Call for Price Waterhouse II: The Legacy of Justice O'Connor's Direct Evidence Requirement for Mixed-Motive Employment Discrimination Claims*, 61 Alb. L. Rev. 627, 659 (1997).

The prospect of turning every Title VII retaliation claim into a mixed-motive case is especially problematic because employment decisions often provide fertile grounds for both discrimination and retaliation claims. Employment decisions frequently rely on subjective criteria, which may encourage a plaintiff to claim that a protected characteristic and/or unlawful retaliation was *a* motivating factor, as opposed to *the* motivation. As the Seventh Circuit aptly observed:

> Some employees will cry "fraud" to make pests of themselves, in the hope of being bought off with higher salaries or more desirable assignments. Others will perceive the disappointments of daily life as "retaliation" and file suits that have some settlement value because of the high costs of litigation and the possibility of error. Careless cries of fraud are less culpable, but may be no less costly, than extortionate ones.

Neal v. Honeywell, 33 F.3d at 863. Simply put, "[d]ealing with false alarms drains time from productive activities." *Id.*

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully submit that the judgment of the district court and court of appeals below should be reversed.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-484

In the Supreme Court of the United States

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER,

Petitioner,

v.

NAIEL NASSAR, M.D.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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INTEREST OF *AMICI CURIAE*[1]

The Foundation for Individual Rights in Education, Inc. ("FIRE") is a non-partisan, non-profit, tax-exempt educational and civil liberties organization pursuant to section 501(c)(3) of the Internal Revenue Code dedicated to promoting and protecting First Amendment rights at our nation's institutions of higher education. FIRE believes that the law must remain clearly and vigorously on the side of free speech on campus.

Alliance Defending Freedom is a non-profit, public interest legal organization that provides strategic planning, training, funding, and direct litigation services to protect our first constitutional liberty—religious freedom. Since its founding in 1994, Alliance Defending Freedom has played a role, either directly or indirectly, in many cases before this Court, including: *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436 (2011); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); as well as hundreds more in lower courts.

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[1] The parties granted mutual consent to the filing of *amicus curiae* briefs in support of either party or of neither party pursuant to S. Ct. R. 37.3(a). Documentation reflecting the parties' mutual consent agreement has been filed with the Clerk. Pursuant to S. Ct. R. 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Many of these cases involve the proper application of the Free Speech Clause in the educational context. Dissenting students and faculty at public schools and universities are often victims of unlawful retaliation due to their protected expression. Recognizing that the Court's decision in this case could have an adverse impact on the ability of those individuals to prosecute First Amendment and Title VII retaliation claims, Alliance Defending Freedom seeks to ensure that the First Amendment's guarantee of religious free speech is safeguarded in the public square and higher education.

SUMMARY OF THE ARGUMENT

Over forty years ago, this Court declared that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967). Robust protection of academic freedom and free speech for students and faculty is essential to preservation of the "marketplace of ideas" on campus. *Id.* In fact, those freedoms are "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Id.* (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

Despite these proclamations students and faculty are regularly censored on today's public school and university campuses. Administrators empowered by explicit or implicit campus speech codes regularly retaliate against students and faculty who advocate views in conflict with campus

orthodoxy. But savvy administrators often cloak their retaliatory actions in seemingly benign critiques of educational or professional incompetence. Rarely can one say that a decision was motivated by a single factor. As a result, students and faculty who look for justice in the courts often resort to First Amendment or Title VII retaliation claims in which they need show only that their speech was the "substantial" or "motivating" factor for the punishment. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). Petitioner here urges that standard be altered to require Title VII plaintiffs to prove that "but-for" the alleged unlawful motive the adverse action would not have been taken.

Amici believe that change in law is ill-advised. But if petitioner's proposal is adopted, and the Court requires a "but-for" standard in Title VII cases, without specific instruction to the contrary from this Court the ruling may lead lower courts to conclude that First Amendment cases also require that standard of proof. Such a result would diminish the ability of student and faculty litigants to effectively challenge unconstitutional censorship. Free speech would suffer in the end.

Whatever its decision in the case at bar, this Court should take care to communicate that its ruling is confined to the statute whose text requires that outcome, and entails no detraction from the authority of the *Mt. Healthy* line of cases that govern claims separately authorized under 42 U.S.C. § 1983.

ARGUMENT

I. A But-For Standard Will Negatively Impact the Academic Freedom and Free Speech of Students and Faculty at Public Schools and Universities.

Students and faculty at public educational institutions depend on protecting their constitutional rights by utilizing the mixed-motive framework for retaliation cases announced in *Mt. Healthy*, 429 U.S. 274. *See, e.g., Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012) (college student speech); *Nagle v. Marron*, 663 F.3d 100, 109 (2d Cir. 2011) (teacher speech); *Adams v. Trustees of Univ. of N.C.-Wilmington*, 640 F.3d 550, 560-61 (4th Cir. 2011) (professor speech); *Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755, 770 (9th Cir. 2006) (high school student speech). Allowing plaintiffs to prove unconstitutional retaliation by showing that their protected conduct was a "substantial" or "motivating" factor in an adverse action reflects the reality that all decisions are based on many factors.[2]

Adopting a but-for causation standard for Title VII retaliation claims without carefully circumscribing the reach of that determination may foster confusion in the lower courts and lead to the abandonment of mixed-motive First Amendment retaliation claims as well. Indeed, after this Court's holding in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), which imposed a but-for standard in Age Discrimination in Employment Act cases, the

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[2] The Court uses "substantial" and "motivating" interchangeably. *Mt. Healthy*, 429 U.S. at 287.

Seventh Circuit succumbed to that temptation and extended *Gross* to First Amendment retaliation claims, *see Fairley v. Andrews*, 578 F.3d 518, 525-26 (7th Cir. 2009) (imposing but-for causation on § 1983 retaliation claims in light of *Gross*), even though in *Gross*, 557 U.S. at 179 n.6, this Court said that constitutional cases like *Mt. Healthy* are not governed by statutory text and have "no bearing" on the correct causation standard. Although a later panel of that circuit retreated from that sweeping change, *see Greene v. Doruff*, 660 F.3d 975, 977-78 (7th Cir. 2011) (rejecting but-for causation in First Amendment retaliation cases, but not overruling *Fairley*), district courts in that circuit continue to apply but-for causation to First Amendment retaliation claims, *see Jenkins v. E. St. Louis Hous. Auth.*, 863 F. Supp. 2d 785, 789 (S.D. Ill. 2012) ("the Supreme Court of the United States clarified recently that, unless a federal statute provides otherwise, a plaintiff bears the burden of demonstrating but-for causation in suits brought under federal law.").[3]

The difference between the statutory sources governing these separate causes of action militates against an identity in standards of proof. But the similarity in substantive relief and policy between these legal remedies may understandably (though

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[3] One scholar explained why courts are tempted in this way: "Numerous other federal statutes, including . . . § 1983 . . . do not use the words 'because of' in their operative language but likewise prohibit discrimination against an individual, in what could colloquially be referred to as 'because of' certain factors or conduct." Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 909-10 (2012).

mistakenly) motivate judicial interest in imposing a proof standard common to both. For this reason *amici* urge this Court to admonish lower courts against the unwarranted transfer of its ruling beyond the boundaries of this case to retaliation claims under § 1983.

Imposition of a but-for standard on First Amendment retaliation claims would place the students and faculty who suffer retaliation for voicing their opinions on campus in the difficult position of having to prove the retaliation is motivated solely by their speech. Yet in many cases, savvy school administrators when penalizing faculty or students for their speech claim benign, non-discriminatory reasons. A but-for analysis enables the defeat of the plaintiff's claims even when viewpoint discrimination motivated the challenged retaliation. A mixed-motive standard provides greater protection to civil liberties at public schools and universities.

A. A But-For Proof Requirement for Civil Rights Retaliation Will Inhibit Robust Protection of Free Speech and Academic Freedom on Campus.

"[F]ree speech is of critical importance" on public university and college campuses throughout this country "because it is the lifeblood of academic freedom." *DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008). Without free speech on campus for students and faculty, the "marketplace of ideas" as we know it would cease to exist. *Keyishian*, 385 U.S. at 603. Indeed, the core principles of the First Amendment "acquire a special significance in the

university setting, where the free and unfettered interplay of competing views is essential to the institution's educational mission." *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 863 (E.D. Mich. 1989) (citing *Keyishian*, 385 U.S. at 603).

In the educational community, many players lay claim to "academic freedom," an idea with varying definitions. *See* Br. for *Amici Curiae* American Cou :il on Education, et al. ("ACE") 11-12. Academic institutions assert the academic freedom to set curriculum, make employment decisions, and proscribe academic standards, but teachers assert it to protect their ability to pursue scholarship without interference. *Sweezy v. State of N.H.*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring); *see Piarowski v. Ill. Cmty. Coll. Dist. 515*, 759 F.2d 625, 629 (7th Cir. 1985) (Posner, J.) ("'academic freedom' . . .is used to denote both the freedom of the academy to pursue its end without interference from the government . . . and the freedom of the individual teacher . . . to pursue his ends without interference from the academy; and these two freedoms are in conflict."). The institutional rights must be balanced against the rights of faculty and students to speak freely on and off campus. *Sweezy*, 354 U.S. at 250; *see also Peacock v. Duval*, 694 F.2d 644, 647 (9th Cir. 1982) ("Although we recognize the necessity for the efficient functioning of a public university, such efficiency cannot be purchased at the expense of stifling free and unhindered debate on fundamental educational issues.") (internal citations omitted).

At its core, academic freedom is rooted in the Free Speech Clause of the First Amendment. And "[i]t has long been recognized that the purpose of

academic freedom is to preserve the 'free marketplace of ideas'" against "arbitrary interference of university officials." *Parate v. Isibor*, 868 F.2d 821, 830 (6th Cir. 1989) (citing *Keyishian*, 385 U.S. at 603). Indeed, this Court has always strived to protect faculty and student speech, whenever possible. *See, e.g.*, *Garcetti v. Ceballos*, 547 U.S. 410, 420 (2006) (leaving open protection of faculty teaching and scholarship from restrictions on employment-related speech); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651-52 (1999) (protecting ability of students to speak freely and making schools liable for student-on-student harassment only when it is severe, pervasive, and objectively offensive); *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670-71 (1973) (protecting offensive student speech in higher education); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (protecting student speech that is not materially or substantially disruptive).

These broad protections for student and faculty speech are supported by the mixed-motive framework established in *Mt. Healthy*, which uncovers retaliatory conduct threatening to fundamental rights. Often, the evidence surrounding punishment of a student on campus or a faculty member in the workplace contains several justifications for the adverse action. In the case of a professor, a college may deny her tenure because of a less than preferred number of publications and the viewpoints she expresses in existing publications. Rarely is any decision made for one reason alone. *See, e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Rarely can it

be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one."). As Senator Case famously stated during the debates on the Civil Rights Act of 1964: "If anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of." Senator Case, 110 Cong. Rec. 13,837-38 (1964) (Debates on the Civil Rights Act of 1964).

For nearly four decades, the mixed-motive standard has proved a vital doctrine to protect constitutional and civil rights. By asking this Court to abrogate *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), petitioner's request might be perceived also as a challenge to *Mt. Healthy*, which notably, informed the analysis contributing to *Price Waterhouse*'s mixed-motive standard. *See Price Waterhouse*, 490 U.S. at 248-49 (referencing *Mt. Healthy*); *see also Desert Palace v. Costa*, 539 U.S. 90, 93 (2003) (discussing the six justices who approved of the mixed-motive standard in *Price Waterhouse*).

B. The Mixed-Motive Standard Announced in *Mt. Healthy* Protects Fundamental Rights.

In *Mt. Healthy*, a public school declined to rehire a teacher after he told a disc jockey about a new school dress code. 429 U.S. at 282. The teacher previously had argued with co-workers, profanely described certain students, and made an obscene gesture at the school. The school justified its rehire denial by citing the teacher's "notable lack of tact in handling professional matters," particularly, the

radio station incident and the obscene gestures. *Id.* at 282-83. This Court held that "the burden was properly placed upon [the teacher] to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor' or to put it in other words, that it was a 'motivating factor' in the [school's] decision not to rehire him." *Id.* at 287. The Court balanced the interests of employees and employers by adding that once an employee has shown the constitutionally protected conduct was a motivating factor, the defendant may show that "it would have reached the same decision" anyway. *Id.*

In *Price Waterhouse*, six justices adopted the mixed-motive framework in a sex discrimination suit under 42 U.S.C. § 2000e *et seq.* *See* 490 U.S. at 248-49 (Brennan, J., plurality) (discussing *Mt. Healthy*); *id.* at 258-59 (White, J., concurring) (same); *id.* at 263-69 (O'Connor, J., concurring) (discussing the *Arlington Heights* mixed-motive framework). This Court said: "To construe the words 'because of' [in Title VII] as colloquial shorthand for 'but-for causation,' . . . is to misunderstand them." *Id.* at 240. After all, "Title VII [is] meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations." *Id.* at 241. Thus, the Court held that "once a plaintiff . . . shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role." *Id.* at 244-45. The Court acknowledged that it had reached "a similar conclusion" in *Mt. Healthy*. *Id.* at 248.

The mixed-motive framework "protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights." *Mt. Healthy*, 429 U.S. at 287.

C. The But-For Standard Is Not Rooted in Reality and Gives Defendants a Litigation Advantage.

Under a but-for standard, First Amendment retaliation litigants would be handicapped in attempts to vindicate their constitutional rights. The requirement that they prove that discrimination was the sole cause of an adverse educational or employment action would dramatically enhance the difficulty of their cases, and thus diminish the availability of remedies. Conversely, this altered standard would relieve government officials of the salutary incentives to fairness that viable retaliation claims bring.

When debating the Civil Rights Act of 1964, "Congress expressly rejected the notion that Title VII liability attached only when discrimination was the sole cause of the employment action." *Griffith v. City of Des Moines*, 387 F.3d 733, 740 (8th Cir. 2004) (Magnuson, J., concurring). Congress rejected but-for causation because it is more difficult to prove and not rooted in reality. As one commentator noted, "[b]y requiring conclusive proof of actual causation, but-for causation is undoubtedly more difficult to prove than mixed-motive causation which requires proof that an illicit motive was part of the consideration." Bran Noonan, *The Impact of* Gross v. FBL Financial Services, Inc. *and the Meaning of the*

but-for Requirement, 43 SUFFOLK U. L. REV. 921, 929 (2010). Another commentator finds three problems with but-for causation: "(1) It is difficult to prove this type of causation; (2) this standard allows some employers to engage in discrimination with impunity; and (3) this standard will yield a windfall to defendants in certain cases." Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 515 (2006).

The but-for standard is not rooted in reality, as it "requires the mental construction of a non-existent world – one in which the defendant's action did not occur." *Id.* As this Court noted in *Price Waterhouse*:

> Suppose two physical forces act upon and move an object, and suppose that either force acting alone would have moved the object. As the dissent would have it [under a but-for scheme], neither physical force was a "cause" of the motion unless we can show that but for one or both of them, the object would not have moved; apparently both forces were simply "in the air" unless we can identify at least one of them as a but-for cause of the object's movement. Events that are causally overdetermined, in other words, may not have any "cause" at all. This cannot be so.

490 U.S. at 241. Justice O'Connor's concurring opinion expressed similar skepticism about the but-for standard:

> "[T]he [but-for] test demands the impossible. It challenges the imagination of the trier to probe into a purely fanciful and unknowable

> state of affairs. He is invited to make an estimate concerning facts that concededly never existed. The very uncertainty as to what might have happened opens the door wide for conjecture. But when conjecture is demanded it can be given a direction that is consistent with the policy considerations that underlie the controversy."

Id. at 264 (O'Connor, J., concurring) (quoting Wex S. Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60, 67 (1956)).

The but-for test also inhibits a civil rights plaintiff from successfully prosecuting his claims because often times defendants control the evidence that a plaintiff needs to prove his case. Katz, *supra*, at 515. Thus, "there is something unfair about requiring plaintiffs to prove 'but for' causation." *Id.* at 516; *see also Price Waterhouse*, 490 U.S. at 263 (O'Connor, J., concurring) ("[T]he law has long recognized that in certain 'civil cases' leaving the burden of persuasion on the plaintiff to prove 'but-for' causation would be both unfair and destructive of the deterrent purposes embodied in the concept of duty of care."); *Toney v. Block*, 705 F.2d 1364, 1366 (D.C. Cir. 1983) (Scalia, J.) (stating that it would be "destructive of the purposes of Title VII to require the plaintiff to establish . . . the difficult hypothetical proposition that, had there been no discrimination, the employment decision would have been made in his favor").

The mixed-motives standard protects civil liberties by affording civil rights plaintiffs the viable opportunity to challenge unconstitutional conduct

that may be masked by other educational or employment considerations. Under a but-for standard, university employers like petitioner may proffer, at or before trial, alternative justifications for the adverse employment or educational actions and thereby gain litigation advantage. That strategic litigation advantage (to prevail at summary judgment) is one understandably attractive to and sought by higher educational organizations, ACE Br. 8-9, but it bodes ill for academic freedom and free speech of their students and faculty members. With the but-for trump card in hand, a university may thwart a student or faculty member's protest of unlawful retaliation.

D. *Amici* Are Aware of Many Cases Where Students, Faculty, and Staff Could Have Had Their Claims Affected Adversely by a But-For Standard.

Academic freedom and campus free speech depend on opportunities for students and faculty to challenge the entrenched orthodoxy. Too often public schools and universities censor and retaliate against dissenters for their speech, but cloak those adverse actions in seemingly benign justifications. A but-for standard facilitates such punishment of disfavored speakers and thus imperils the marketplace of ideas.

Untenured faculty would be left particularly vulnerable upon an elimination of the mixed-motive standard in both Title VII and First Amendment claims. "In all but the clearest cases, the decision to terminate a probationary teacher's employment entails the complicated weighing of many factors,

almost all of which are subjective. An essential element of the probationary process is periodic assessment of the teacher's performance, including the person's ability and willingness to work effectively with his colleagues." *Mabey v. Reagan*, 537 F.2d 1036, 1044 (9th Cir. 1976). An untenured professor may receive an annual review from several peers, some of whom may consider the viewpoints expressed in the professor's writings or communications with peers. A court's

> close examination is particularly appropriate [in these cases] where . . . a complex of reasons may as well mask an unlawful motive as legitimately motivate a refusal to rehire, and where all of those in the group are subject to the threat of loss of their jobs for identical ill-defined reasons.

Id. at 1045. Under a but-for standard, an employer met with a charge of retaliation for protected activity could simply posit an alternate ground for termination. This leaves untenured faculty who deviate from the carefully guarded boundaries of fashionable opinion in a dubious legal position should they face retaliation for their nonconformity.

In *Cockrel v. Shelby County School District*, 270 F.3d 1036 (6th Cir. 2001), a public school fired a teacher who decided to teach students about uses of industrial hemp. The school's termination notice detailed several performance deficiencies and instances of misconduct, but the teacher asserted the school fired her for inviting the actor Woody Harrelson to speak about industrial hemp. *Id.* at

1045. The Sixth Circuit held that the teacher's introduction of industrial hemp was protected expression. *Id.* at 1050. It then applied *Mt. Healthy*'s mixed-motive standard and concluded that the teacher presented sufficient evidence that a reasonable jury could find her termination was motivated, at least in part, by her protected speech. *Id.* at 1056. Had the Sixth Circuit applied a but-for standard, the teacher's case may not have reached a jury because the school proffered several justifications for terminating her employment.

In California, a public college terminated the employment of an adjunct professor who answered a student's question about the biological basis for homosexuality in a human heredity class. *Sheldon v. Dhillon*, No. C-08-03438-RMW, 2009 WL 4282086, at *1 (N.D. Cal. 2009). The college claimed the professor taught misinformation as science, which justified dismissal. The professor asserted, however, that she merely provided information from the approved course textbook and that she was terminated because a student was offended by her answer. The professor filed a First Amendment retaliation claim. *Mt. Healthy*'s mixed-motive framework allowed the professor's case to survive a motion to dismiss because the evidence showed two reasons for the college's action. Under a but-for standard, however, the professor's case may have never survived a motion to dismiss, let alone reach a jury. The professor would have been obliged to prove that the college terminated her employment solely because a student deemed it "offensive." But because the college offered a competing justification – that it terminated her employment for teaching

misinformation – the professor would not have satisfied a but-for standard.

Student free speech retaliation claims will suffer under a but-for standard as well. Recently, a public university dismissed a counseling student after she referred a client to another counselor in a practicum program because the client wanted counseling on a same-sex relationship. The student's religious beliefs prevented her from offering the counseling requested. *Ward*, 667 F.3d at 731-32. The evidence presented mixed motives for the dismissal. The university asserted that it expelled the student because she violated counseling ethics, but the Sixth Circuit held a reasonable jury could also find that the university dismissed the student because of her religious views and speech. *Id.* at 735. The defendants' statements indicated that the student's "religious beliefs *motivated* their actions." *Id.* at 738 (emphasis added). Under a but-for standard, the student may never have survived summary judgment because the university could have argued that she had not proved that her speech was the but-for cause of its discipline.

In another instance, a resident assistant at the University of Wisconsin–Eau Claire received a disciplinary letter prohibiting him from holding Bible studies in his dorm room.[4] It is rare that a university will actually admit in writing that the

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[4] Raquel Rutledge, *Bible study policy raises ire UW-Eau Claire resident assistant can't lead group*, Milwaukee J. Sentinel, Nov. 4, 2005, at A; *see also University of Wisconsin at Eau Claire: Ban on RAs' Leading Bible Studies*, Foundation for Individual Rights in Education, http://thefire.org/case/689 (last visited Apr. 9, 2013).

student is being punished for his or her expression. More commonly, if the university had disciplined the student because of the Bible studies *and* his failure to perform proper room-checks, then the student's case would have fallen into a mixed-motive scenario. The student would not be able to prove that but for the Bible study, he would not have been punished, because the university could assert that he was punished for failure to perform room-checks. In contrast, under *Mt. Healthy*'s mixed-motive framework, the student could show that the presence of an unlawful motive – his protected speech during Bible studies – played a role in the university's disciplinary actions.

The risk the but-for standard presents to student and faculty speech claims is identified in the inherently provincial and multivariable justifications readily available in the academic context. For this reason the preservation of the mixed-motive standard is vital to maintaining the utility of § 1983 litigation in preserving and protecting constitutional liberties on campus.

The ACE *amici* raise a couple of issues worth addressing. First, they assert that the but-for standard will "safeguard [their own institutional] academic freedom," ACE Br. 10, but fail to mention that this comes at the expense of the free speech rights of their students and faculty. Second, the ACE *amici* suggest that internal grievance procedures protect academic freedom and free speech, but what they really mean is their *institutional* academic freedom. ACE Br. 13-14. Professor Sheldon, Julea Ward, and others filed internal grievances. These processes provided

neither disinterested adjudicators nor regard for their First Amendment rights. Contrary to the assertions of the ACE *amici*, *see* ACE Br. 7, academic freedom does not suffer under a mixed-motive framework, it thrives. It will suffer if the litigants are subject to a but-for standard of proof for their claims of retaliation.

II. The Court Should Leave § 1983 Retaliation Untouched by the Outcome of This Case.

Finally, if this Court were to adopt the but-for standard in Title VII retaliation claims, it should specifically cabin its holding to Title VII alone. Unlike Title VII, First Amendment retaliation claims under 42 U.S.C. § 1983 are not governed by the specific statutory language at issue here, 42 U.S.C. § 2000e-3. The anti-retaliation provision in § 1983 is implied in the statute. As such, "the constitutional cases such as *Mt. Healthy* have no bearing on the correct interpretation of ADEA [or Title VII retaliation] claims, which are governed by statutory text." *Gross*, 557 U.S. at 179 n.6. But courts, however, improperly may still import standards governing one claim into another. *See Fairley*, 578 F.3d at 525-26 (adopting but-for in § 1983 retaliation cases). This Court has admonished lower courts against that mistake. *See Gross*, 557 U.S. at 174 (reminding courts to "be careful not to apply rules applicable under one statute to a different statute without careful and critical examination"); *cf. Smith v. Xerox Corp.*, 602 F.3d 320, 329 (5th Cir. 2010) (declining to adopt *Gross*' ADEA reasoning to a Title VII claim because that would violate the Court's "admonition against intermingling interpretations of two statutory

schemes"). However the Court rules in the case at bar, it should explicitly limit the scope of its holding and preserve *Mt. Healthy*'s mixed-motive standard.

CONCLUSION

The judgment of the Fifth Circuit should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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BRIEFS

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In The
Supreme Court of the United States

UNIVERSITY OF TEXAS
SOUTHWESTERN MEDICAL CENTER,
Petitioner,

v.

NAIEL NASSAR, M.D.,
Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee) is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Directors and Trustees presently includes more than 200 of the nation's leading lawyers. Through the Lawyers' Committee and its independent local affiliates, hundreds of attorneys have represented thousands of clients in employment discrimination cases across the country.

SUMMARY OF ARGUMENT

Strong arguments have been made by Respondent and many of its *amici* urging this Court to hold that Section 704 of the Civil Rights Act of 1964[2] is violated if retaliation is a motivating factor

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[1] Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3. Per Supreme Court Rule 37.6, no portion of this brief was authored by counsel for any party, and no person or entity other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] Section 704 of the Civil Rights Act states: It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed, any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title. 42 U.S.C. § 2000e-3(a).

in an adverse employment decision. We support these arguments. But we write to stress that "but for" causation - the standard urged by Petitioner - does not require a showing of sole cause.

Petitioner and at least two *amici* supporting petitioner wrongly suggest that a plaintiff cannot prevail under a "but for" standard unless a discriminatory reason is the sole cause of the employment decision. The retaliation provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.*, the provision at issue in this case, and other civil rights statutes require that the action taken was "because of" the protected trait. "Because of" has, at its narrowest, been interpreted to mean "but for" causation. "But for" causation requires that the illegal reason was a determinative reason for the action. It does not mean that the illegal reason must be the sole cause of the action. Petitioner frames the question presented to this Court as implying that there is a dichotomy between multiple causes and "but for" causation, and wrongly equates "but for" with sole cause.

This position is contrary to the statute, this Court's precedent construing the statute, and the meaning of "but for" in tort law. It is also contrary to the complex realities of the workplace to suggest that any decision to hire, fire, promote, or demote an employee was made for a single reason. Requiring that a plaintiff prove that an illegitimate reason was the sole cause of an employment decision would eviscerate the protections of Title VII's retaliation provisions.

ARGUMENT

I. Contrary to Petitioner's Suggestion, This Court Has Consistently Rejected Sole Cause As a Proper Interpretation Of "Because of" In Title VII and Other Civil Rights Statutes.

Petitioner and at least two *amici* supporting Petitioner wrongly suggest that a plaintiff cannot prevail unless a discriminatory reason is the sole cause of the employment decision. Petitioner frames the question presented to this Court as implying that there is a dichotomy between multiple causes and "but for" causation, and wrongly equates "but for" with sole cause. Petitioner further references Section 504 of the Rehabilitation Act[3] to explain that "solely by reason of" is "at least as strict a standard as but-for causation." Pet'r Br. at 29.

Amici reinforce this erroneous interpretation of "but for" causation. One *amicus* attempts to illustrate the difference between "but-for" and "motivating factor" jury instructions by providing a but for instruction requiring that the protected characteristic has to be "*the sole motivating factor...*" Br. of *Amicus Curiae* Voice of Defense Bar at 18 (emphasis in original). Another argues that section 704(a)'s "because of" language requires retaliation plaintiffs "to prove that they suffered an adverse

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[3] Section 504 of the Rehabilitation Act states: "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be . . . subjected to discrimination." 29 U.S.C. § 794(a).

employment action directly as a result of, and for no reason other than, their statutorily protected conduct." Br. of *Amicus Curiae* Equal Employment Advisory Council, *et. al.* at 7.

This position is unsupported by this Court's precedent construing "because of" in Title VII and other civil rights statutes. Title VII's principal substantive provision, as initially enacted, prohibits employment decisions made "because of [an] individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1) (2006). Likewise, Title VII's retaliation provision makes it an unlawful employment practice to discriminate against an individual "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).

In *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), a Title VII pretext case, the Court explicitly rejected the suggestion that a plaintiff must demonstrate that discrimination was the "sole cause" of the contested employment action under § 2000e-2(a)(1). The Court held: "the use of the term 'pretext' in this context does not mean, of course, that the Title VII plaintiff must show that he would have in any event been rejected or discharged solely because of his race...as [*McDonnell Douglas*] makes clear, no more is required to be shown than that race was a 'but for' cause." *McDonald*, 427 U.S. at 282 n. 10 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973)).

In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989) (plurality decision) the plurality opinion and both concurrences clearly rejected "because of" as meaning solely because of in finding that Title VII cases can involve mixed motives. Justice White's concurrence discussed the Court's previous rejection of the sole cause standard. *Id.* at 259 (White, J., concurring) ("Hopkins was not required to prove that the illegitimate factor was the only, principal, or true reason for the petitioner's action"). Justice O'Connor noted that the workplace environment makes it difficult for a plaintiff to show that a "decision [is] motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one. *Id.* at 268 (O'Connor, J., concurring).

Most importantly, Justice Kennedy, writing for the dissent, provided a thorough analysis of why "but for" causation did not require the plaintiff to demonstrate that the protected characteristic was the sole reason for the adverse employment decision:

> No one contends, however, that sex must be the sole cause of a decision before there is a Title VII violation. This is a separate question from whether consideration of sex must be *a* cause of the decision. Under the accepted approach to causation that I have discussed, sex is a cause for the employment decision whenever, either by itself or in combination with other factors, it made a difference to the decision. Discrimination need not be the sole cause in order for liability to arise,

> but merely a necessary element of the set of factors that caused the decision, *i.e.*, a but-for cause.

Id. at 284 (emphasis in original).

A number of courts have rejected a requirement of "sole cause" in other civil rights statutes that use "because of" language. All circuits, save one, which have addressed the causation issue under the Americans with Disabilities Act (ADA) have rejected a sole cause requirement. *See e.g., Head v. Glacier Northwest Inc.*, 413 F.3d 1053, 1065 (9th Cir. 2005) (holding that the motivating factor standard was the most consistent in light of the purpose and plain language of the ADA); *Pickerton v. Spellings*, 529 F.3d 513, 517-18 (5th Cir. 2008); *Parker v. Columbia Pictures Indus.*, 204 F.3d 1053, 1063-65 (2d Cir. 2000); *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1073-75 (11th Cir. 1996) (rejecting the sole cause requirement for ADA cases finding that the "literal reliance" on the sole reason standard would lead to "absurd results"). *But see Fitzgerald v. Corrections Corp. of America*, 403 F.3d 1134, 1144 (10th Cir. 2005) (holding that a plaintiff is required to show he was denied "solely by reason of disability" in a Rehabilitation Act and ADA case).

Last year, the Sixth Circuit overruled its previous requirement of "sole cause" under the ADA. *Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 312 (6th Cir. 2012) (*en banc*).[4] The Sixth Circuit was

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[4] The ADA does not contain the word "solely;" it prohibits employers from "discriminat[ing] against a qualified individual

one of only two circuits that required proof of "sole cause" in order to prevail in an ADA case. This requirement derived from the only civil rights statute to actually require sole cause in the text of the law, Section 504 of the Rehabilitation Act.[5]

In *Lewis*, the court reasoned that the Rehabilitation Act's "sole cause" standard does not apply to ADA claims because the text of the ADA does not provide that a plaintiff must prove that his or her disability was the "sole" cause" but rather contains a "because of" standard of causation.

Similarly, "but for" causation does not mean sole cause under the Age Discrimination in Employment Act (ADEA).[6] In *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), this Court held that "because of" in an ADEA case means "but for" causation, to require the plaintiff to prove that "the employee's protected trait actually played a role in [the employer's decision making process] *and had a determinative influence on the outcome.*" 557 U.S. at 176 (emphasis in the original) (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)). That standard does not require proof of sole cause. In *Gross*, this Court found that the illegitimate

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with a disability because of the disability of such individual." 42 U.S.C. § 12112(a).

[5] *See supra* note 2.

[6] The Age Discrimination in Employment Act of 1967 makes it "unlawful for an employer...to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age[.]" 29 U.S.C. 623(a)(1).

consideration must be significant enough to be determinative, but does not require solely by reason of and provides for multiple motives. *Id.*

Indeed the Tenth Circuit interpreted *Gross* to hold that the ADEA requires "but for" causation but not "sole" causation. *Jones v. Oklahoma City Public Schools*, 617 F.3d 1273, 1277-78 (10th Cir. 2010). In doing so, the Court specifically rejected the employer's argument that "but for" causation means "sole cause." *Id.*

In addition, the Fourteenth Amendment's standard for showing unconstitutional discrimination also rejects a sole cause requirement. In *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977) a group of minority plaintiffs claimed that a municipal governing body's refusal to rezone a plot of land to allow the construction of low-income integrated housing was racially motivated. The Court noted that "rarely can it be said that a legislative or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one." *Arlington Heights*, 429 U.S. at 265 (discussing *Washington v. Davis*, 426 U.S. 229 (1976)).

Similarly in *Personnel Adm'r v. Feeney*, 442 U.S. 256, 277 (1979), the Court noted the problem of ascertaining the collective motivation of a legislative or administrative body which is similar to many personnel decisions. The Court explained "[discriminatory purpose] implies that the decisionmaker . . . selected or reaffirmed a particular

cause of action at least in part 'because of,' not merely 'in spite of' its adverse effects upon an identifiable group." *Id.* at 279.

II. Tort Law Recognizes That "But For" Causation Does Not Mean Sole Cause.

This court has looked to tort law for guidance on the nature of "but for" causation. *See e.g., Price Waterhouse,* 490 U.S. at 266 (O'Connor, J. concurring) (characterizing cause-in-fact in tort law as "analogous to cause-in-fact in disparate treatment law); *Id.* at 286 (Kennedy, J dissenting); *Gross,* 557 U.S. at 176-77 (citing W. Keeton, *et. al.,* Prosser and Keeton on Law of Torts 265 (5th ed. 1984)). The Restatement (Third) of Torts explicitly recognizes that "but for" causation does not mean sole cause and that there will be multiple causes-in-fact for almost any event. The Restatement describes cause-in-fact as "a necessary condition for the outcome" at issue even though many other factual causes were also present. *See* Restatement (Third) at § 26 cmt. c. *See also* Brian S. Clarke, *A Better Route Through The Swamp: Causal Coherence in Disparate Treatment Doctrine,* Rutgers L. Rev. at 40 *(forthcoming 2013), available at* http://ssrn.com/abstract=2211778.

III. Title VII's Legislative History Supports the Fact That "But For" Does Not Mean Sole Cause.

During the debates over the original passage of Title VII, the Senate rejected a proposed amendment that would have explicitly made liability contingent on a protected characteristic being the sole basis for the employer's decision. This

amendment was rejected because it would render the statute, in the words of Senator Clifford Case, the Republican floor manager of Title VII, "totally nugatory." 110 Cong. Rec. 13, 837-38 (1964). Senator Case continued "[if] anyone ever had an action motivated by a single cause, he is a different animal from any I know of." 110 Cong. Rec. 13, 837-38.

IV. A Sole Cause Requirement Would Create an Insurmountable Barrier to Proving Retaliation and Would Severely Impact the Ability to Enforce Fair Employment Practices.

A sole cause standard in retaliation claims would eviscerate enforcement of Title VII's retaliation provision. An employer would prevail merely by identifying one reason other than discrimination that might have played a role in the decision to take the adverse action against the employee. If the promise of protection from retaliation was rendered meaningless, enforcement of the substantive provisions of Title VII would be substantially undercut.

This Court has repeatedly recognized that Title VII's promise of fair employment practices can only be realized if employees feel secure in filing complaints and acting as witnesses regarding discriminatory conduct. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006); *see also Thompson v. North American Stainless, LP.*, 131 S. Ct. 863, 868 (2011). When retaliatory motives play a role in an adverse action, this Court has recognized that "[f]ear of retaliation is the leading reason why

people stay silent instead of voicing their concerns about bias and discrimination." *Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn.*, 555 U.S. 271, 279 (2009) (citing Deborah L. Brake, *Retaliation*, 90 Minn. L. Rev. 18, 20 (2005)).

The Court should make clear that "but for" causation does not mean sole cause and that there may be multiple causes for an adverse action so long as the illegal cause was a determinative factor in the decision.

CONCLUSION

For these reasons, the Court should affirm the judgment below.

Respectfully submitted,

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UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, PETITIONER

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ON A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN AND ELEVEN OTHER STATES IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Title VII's retaliation provision requires a plaintiff to prove but-for causation (*i.e.*, that an employer would not have taken an adverse employment action but for a retaliatory motive), or instead requires only proof that the employer had a mixed motive (*i.e.*, that a retaliatory motive was one of multiple reasons for the employment action).

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INTEREST OF *AMICI CURIAE*

The *amici* states and their municipalities employ millions of Americans. States and municipalities as a whole employ nearly 20 million people, roughly 12.5% of the country's labor force. The *amici* states are also uniquely situated. While they are among the nation's largest employers, *amici* have adopted statutes, rules, and regulations prohibiting retaliation against employees who oppose unlawful discrimination in employment. And *amici* are among the 48 states that have fair-employment-practice agencies that have entered into workshare agreements with the EEOC to jointly enforce federal and state anti-discrimination laws and the attendant prohibitions on retaliation.

The Fifth Circuit's decision below allows plaintiffs asserting retaliation in violation of Title VII to prove only that retaliation was a motive for an adverse employment action, rather than that retaliation was the but-for cause of that action. That mixed-motive analysis is inconsistent with the text of Title VII's antiretaliation provision. And the *amici* states have learned that the mixed-motive analysis is also too difficult to apply in an even-handed fashion. Accordingly, the *amici* states seek reversal of the Fifth Circuit's decision and a holding that to prevail on a Title VII retaliation claim, a plaintiff must prove that a retaliatory motive was the but-for cause of an adverse employment action.

INTRODUCTION AND SUMMARY OF ARGUMENT

In response to the mixed-motives analysis adopted by a majority of the Court in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), Congress amended Title VII to make it unlawful for an employer to take an adverse employment action where race, ethnicity, religion, or gender is a motivating factor, even if the employer would have made the same decision in the absence of the discriminatory factor. In fact, Congress specifically adopted a burden-shifting analysis for such mixed-motives discrimination cases and tailored the remedies available when an employer has both legitimate and improper motives when taking an adverse employment action against an employee. Moreover, Congress adopted the same burden-shifting approach in the Uniformed Services Employment and Reemployment Rights Act, for both its non-discrimination *and* antiretaliation provisions. 38 U.S.C. § 4311(c).

But Congress did not similarly create a mixed-motives construct for Title VII's antiretaliation provision. As a result, Title VII's antiretaliation provision requires but-for causation. This Court reached the same conclusion, analyzing the same language ("because") in the Age Discrimination in Employment Act. *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 179–80 (2009).

Other considerations militate against extending the *Price Waterhouse* mixed-motives analysis to statutes that impose a "because" standard. First, as members of this Court have repeatedly noted, correctly

applying the mixed-motives analysis is difficult for both judges and juries. Second, applying the mixed-motives analysis to retaliation claims threatens to make Title VII a thought-control statute by allowing the imposition of liability for bad thoughts instead of unlawful actions.

Interpreting the phrase "because of" in Title VII's antiretaliation provision differently from how this Court interpreted the same words in the ADEA will sow confusion and propagate additional litigation under nearly all of the major federal employment statutes. The language should be given a single, uniform interpretation, and the Fifth Circuit's decision should be reversed.

ARGUMENT

I. Title VII's antiretaliation provision requires but-for causation and does not incorporate a mixed-motive analysis.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, prohibits two types of conduct: discrimination on the basis of race, ethnicity, religion, or gender and retaliation against an employee for attempting to advance or secure the Act's guaranty of a workplace free from such discrimination. *Burlington N. & Santa Fe Ry.* v. *White*, 548 U.S. 53, 63 (2006). The antiretaliation provision provides protection to employees for their conduct. *Id.* Specifically, the antiretaliation provision provides as follows:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . *because* he has opposed any practice made an unlawful employment practice by this subchapter, or *because* he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter. [42 U.S.C. § 2000e-3(a) (emphasis added).]

Thus, the operative language in the antiretaliation provision prohibits employers from discriminating against employees "because" of protected activity.

In *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), the Court considered how Title VII's because-of standard of causation for discrimination claims worked in mixed-motives cases. *Id.* at 232. Specifically, the Court construed the "because of" language in 42 U.S.C. § 2000e-2(a)(1) to determine whether an employer has liability to an employee under Title VII where improper and legitimate considerations both play a role in an adverse employment decision. *Ibid.* The plurality decision created a burden-shifting framework to determine causation in mixed-motives cases: "[I]f a Title VII plaintiff shows that discrimination was a '"motivating"' or a '""substantial""' factor in the employer's action, the burden of persuasion should shift to the employer to show that it would have taken the same action regardless of that impermissible consideration." *Gross*, 557 U.S. at 171–72 (citing *Price Waterhouse*, 490 U.S. at 258 (plurality opinion); *id.* at 259–260 (opinion of White, J.); *id.* at 276 (opinion of O'Connor, J.)).

Two years after *Price Waterhouse*, Congress amended Title VII to expressly incorporate the "motivating factor" mixed-motive analysis into Title VII's nondiscrimination provision. The Civil Rights Act of 1991 provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin *was a motivating factor* for any employment practice, even though other factors also motivated the practice." Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075 (1991) (codified at 42 U.S.C. § 2000e-2(m)) (emphasis added). The amendment provides a limited affirmative defense when the respondent can show that it "would have taken the same action in the absence of the impermissible motivating factor." *Id.* § 107(b), 105 Stat. at 1075–76 (codified at 42 U.S.C. § 2000e-5(g)(2)(B)). If the respondent succeeds on this defense, the complaining party is entitled to attorney fees and costs but cannot obtain damages or an injunction requiring hiring, reinstatement, or promotion. *Id.*

Notably, the Civil Rights Act of 1991 did not address mixed motives in connection with Title VII's antiretaliation provision. In other words, Congress did not amend Title VII to allow a plaintiff to establish an unlawful employment practice where a plaintiff establishes that protected activity "was a motivating factor for any employment practice, even though other factors also motivated that practice."

In *Gross*, the Court again addressed the meaning of the "because of" causation standard, this time in the context of the Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(1). Even though the ADEA and Title VII both concern employment discrimination, and both

use the same "because of" language, the Court declined to apply Title VII's motivating-factor analysis to the ADEA. *Gross*, 557 U.S. at 173. The Court reasoned that because Congress did not incorporate the motivating-factor language into the ADEA at the same time it amended Title VII, Congress intended that the ADEA's causation standard would remain unchanged. *Id.* at 175.

The Court in *Gross* focused on the text of the ADEA, and specifically on what the "because of" causation standard requires. *Id.* at 175–76. The Court determined that Congress's use of the words "because of" means that it intended to impose liability where a person's disability was the but-for cause of an adverse employment decision. *Id.* at 176–77. The Court noted that this interpretation is consistent with "'the ordinary default rule that plaintiffs bear the risk of failing to prove their claims.'" *Id.* at 177 (quoting *Schaffer* v. *Weast*, 546 U.S. 49, 56 (2005)). The reasoning in *Gross* applies at least equally to the causation standard for Title VII retaliation claims.

First, Congress expressly incorporated the mixed-motive analysis into Title VII. But Congress did so only as to the nondiscrimination provision, *not* the antiretaliation provision. If Congress intended both the nondiscrimination and antiretaliation provisions to incorporate a mixed-motive causation, Congress would have said so. *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion") (internal quotation

marks and citations omitted). This Court should not rewrite the statute to do what Congress chose not to do. See *Dodd* v. *United States*, 545 U.S. 353, 359–60 (2005).

Moreover, Congress's partial amendment of Title VII provides the evidence of congressional intent that Justice O'Connor found lacking in Title VII's nondiscrimination provision in 1989. In her *Price Waterhouse* concurrence, Justice O'Connor opined that "nothing in the language, history, or purpose of Title VII prohibits adoption" of the burden-shifting approach. *Price Waterhouse*, 490 U.S. at 269 (O'Connor, J. concurring).

Post *Price Waterhouse*, Congress partially adopted the mixed-motives analysis, but only as to Title VII's nondiscrimination provision. Congress's decision not to apply its mixed-motive amendment to Title VII's antiretaliation provision is the very type of evidence that Justice O'Connor concluded was missing from Title VII. Thus under Justice O'Connor's analysis in *Price Waterhouse*, the language and history of Title VII prohibits the adoption of the mixed-motive burden-shifting analysis to retaliation claims.

This evidence of congressional intent is heightened by the Uniformed Services Employment and Reemployment Rights Act of 1994. Congress adopted USERRA to amend and recodify the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. §§ 3021–27 (later recodified at 38 U.S.C. §§ 4301–07). See Pub. L. No. 103-353, 108 Stat. 3149. In USERRA, Congress specifically adopted the mixed-motives analysis in both the statute's non-discrimination *and* antiretaliation provisions. Congress defined actions

prohibited by USERRA to include taking adverse employment action in which "the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services *is a motivating factor* in the employer's action." 38 U.S.C. § 4311(c)(1) (emphasis added). An employer also violates USERRA if a person's action to enforce the Act, participation in a proceeding or investigation to enforce the Act, or exercise of a right under the Act "*is a motivating factor* in the employer's action."[1] 38 U.S.C. § 4311(c)(2) (emphasis added).

Congress is aware of the potential application of the mixed-motives burden-shifting framework to antiretaliation provisions. And Congress has chosen not to apply the framework to antiretaliation provisions in other statutes, including Title VII.

Second, Title VII's antiretaliation provision uses the same "because" standard to define causation that this Court most recently interpreted in *Gross*. Although, as the dissent noted in *Gross*, similar language was construed in *Price Waterhouse*, no single view of the causation standard imposed by "because" garnered a majority of the Court. See *Gross*, 557 U.S. at 183 (Stevens, J. dissenting). Since then, a majority of this Court has concluded that "because" means but-for causation, consistent with the ordinary meaning of that word. *Gross*, 557 U.S. at 176–77; *accord Price Waterhouse*, 490 U.S. at 281 (Kennedy, J. dissenting).

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[1] In USERRA, Congress adopted the mixed-motives burden-shifting framework without providing for the imposition of declaratory relief, injunctive relief, and attorney fees as provided in Title VII where an employer succeeds in proving the affirmative defense. See 42 U.S.C. § 2000e-5(g)(2)(B).

Further, as the Court noted in *Gross* and the dissent noted in *Price Waterhouse*, when statutory text is silent on the allocation of the burden of proof, Congress is presumed to have intended that the plaintiff will carry the burden of proof. *Meacham* v. *Knolls Atomic Power Lab.*, 554 U.S. 84, 91–92 (2008) ("Absent some reason to believe that Congress intended otherwise, . . . we will conclude that the burden persuasion lies where it usually falls, upon the party seeking relief." (internal quotations omitted)); *Schaffer ex rel. Schaffer* v. *Weast*, 546 U.S. 49, 56–57 (2005) ("We therefore begin with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims." (citations omitted)).

This presumption, in tandem with the normal meaning of the word "because," convinced the Court in *Gross* that "the burden of persuasion necessary to establish employer liability is the same in alleged mixed-motives cases as in any other ADEA disparate-treatment action." 557 U.S. at 177–78. The Court should reach the same conclusion based on the same analysis of the same word in Title VII's antiretaliation provision.

Accordingly, a plaintiff seeking to impose liability on an employer for retaliation in Title VII must prove but-for causation. Proof of a mixed motive is legally insufficient.

II. The mixed-motives burden-shifting analysis adopted in *Price Waterhouse* should not be applied to retaliation claims.

As enforcers of state and federal civil rights laws, the *amici* states have come to appreciate that the mixed-motives burden-shifting analysis suffers from significant defects. The dissent in *Price Waterhouse* correctly predicted precisely what the Court later observed in *Gross*—that the mixed-motives burden-shifting analysis adopted in *Price Waterhouse* is difficult to apply. Further, applying the mixed-motives analysis in the retaliation context is likely to punish employers for bad thoughts rather than prohibited conduct.

A. The mixed-motives burden-shifting analysis is difficult to apply correctly.

From the outset, the mixed-motives burden-shifting analysis adopted by Justice O'Connor in *Price Waterhouse* was criticized for providing little practical benefit "at the cost of confusion and complexity, with the attendant risk that the trier of fact will misapprehend the controlling legal principles and reach an incorrect result." *Price Waterhouse*, 490 U.S. at 287 (Kennedy, J. dissenting); see also *ibid.* at 292. This critique has been borne out.

In *Gross*, the Court observed that "it has become evident in the years since [*Price Waterhouse*] was decided that its burden-shifting framework is difficult to apply." 557 U.S. at 179. The federal courts of appeals have repeatedly noted the difficulty in correctly instructing juries on the mixed-motives framework.

E.g., *Townshend* v. *Lumbermens Mut. Cas. Co.*, 294 F.3d 1232, 1239–43 (10th Cir. 2002) (the mixed-motive framework "is a difficult matter for courts, and would certainly be difficult for a jury"); *Tyler* v. *Bethlehem Steel Corp.*, 958 F.2d 1176, 1179–87 (2d Cir. 1992) (defendant's "challenge to the '*Price Waterhouse*' instruction given to the jury draws us into the murky water of shifting burdens in discrimination cases"); *Visser* v. *Packer Eng'g Assocs., Inc.*, 924 F.2d 655, 661 (7th Cir. 1991) (en banc) (Flaum, J. dissenting).

Thus, to the extent that the burden-shifting analysis adopted in *Price Waterhouse* provides any benefit, it is more than offset by the endemic problems of applying the mixed-motives analysis.

B. The mixed-motive burden-shifting analysis has an increased risk of transforming Title VII into a thought-control bill when applied to retaliation claims.

Before its adoption, Title VII was criticized as a "thought control bill" that created a "punishable crime that does not require an illegal external act as a basis for judgment." 100 Cong. Rec. 7254 (1964) (Sen. Ervin). Proponents of the act clarified that the intent of Title VII was to eradicate discriminatory *actions* in the employment setting, not mere discriminatory thoughts. *Ibid.* ("There must be some specific external act, more than a mental act. Only if [an employer] does the act because of the grounds stated in the bill would there be any legal consequences." (Sen. Case)).

The *Price Waterhouse* dissent properly concluded that "Congress' manifest concern with preventing the

imposition of liability in cases where discriminatory animus did not actually cause an adverse action . . . suggests . . . that an affirmative showing of causation should be required." *Price Waterhouse*, 490 U.S. at 282 (Kennedy, J. dissenting). Title VII's legislative history suggests that the antiretaliation provision should also require an affirmative showing of causation. But imposing liability on employers for mixed-motives in the context of retaliation is more troubling than doing so in the context of the antidiscrimination clause because of the nature of retaliation claims.

It is a testament to the effectiveness of the civil rights laws that racial and sex discrimination are subject to considerable moral opprobrium. But as a consequence of that success, false accusations of discrimination naturally engender in the falsely accused feelings of anger, hurt, and resentment. If an employer subsequently takes an adverse employment action against the accuser—an action justified by legitimate considerations—a retaliation claim is likely to follow. Cf. EEOC Charge Statistics, Fiscal Year 1997 Through Fiscal Year 2012, http://www.eeoc.gov/eeoc/statistics /enforcement/ charges.cfm (last visited Mar. 5, 2013) (retaliation claims are the most frequently asserted claims since 2009, showing up in more than 35% of all charges).

A supervisor who feels wrongly accused of discrimination and owns up to such feelings pretrial has likely created a sufficient issue of material fact to allow the accuser's retaliation claim to proceed to trial if the mixed-motives standard applies. This increases the pressure on employers to settle such claims instead of risking an adverse determination by a jury. And such an adverse determination is all the more likely in the mixed-motive context because the jury will be instructed that the employee must show only that retaliatory animus was one factor in an adverse-employment decision.

The net result is that imposing the mixed-motives burden-shifting analysis punishes employers for "bad" but entirely predictable thoughts, where those thoughts cannot be said to have actually caused an adverse-employment action. This is precisely the sort of result that Congress intended to avoid when it enacted Title VII.

There are also two practical concerns that are especially pronounced by mixed-motives liability in the public sector. To begin, state governments, because of their size, often adopt generally applicable rules and rely on individual supervisors to follow and enforce them. When (as in this case) they do so, the system works as it is supposed to. It is unfair to charge the state with retaliation or discrimination based on the subjective thought process of a supervisor who did his job properly, whatever other thoughts he may have had in his head.

In addition, decisions about who to hire for many public service positions are subjective, and thus subject to second-guessing even when there has been no

wrongdoing. That makes it especially unreasonable to shift the burden of proof to the defendant. When the government has done something it is otherwise entitled to do (e.g., demote or fire an employee), and the government has considerable discretion in making that decision, see *Engquist* v. *Oregon Dep't of Agric.*, 553 U.S. 591, 606 (2008), there is no basis for flipping the traditional burden of proof. That would amount to a presumption of malfeasance, contrary to the normal presumption of regularity of government action. If the plaintiff cannot prove causation, it cannot prove wrongdoing.

III. The word "because" should be given a uniform interpretation to promote uniform expectations of statutory terms by employers and employees.

Disparate interpretations of the same word, "because," created the circuit split that is the subject of this case. As the petition notes, the First, Sixth, and Seventh Circuits, as well as numerous district courts, have interpreted *Gross* to mean that when Congress uses "because" to set the level of causation required by an employment statute, Congress intended but-for causation. Pet. 11–12, 14–17. The Fifth Circuit and the Eleventh Circuit have taken the countervailing view, along with at least two district courts. (*Id.* at 12–14, 17.) But concluding that the word "because" means the mixed-motive burden-shifting analysis for purposes of Title VII's antiretaliation provision (while the exact same word in the ADEA does not) will inevitably create additional confusion among employers, employees, and the lower courts.

This is not just a Title VII/ADEA problem. Consider the following federal statutes, each using the term "because" to establish the causation requirement for retaliation or interference claims:

- Americans with Disabilities Act: "No person shall discriminate against any individual *because* such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. § 12203(a) (emphasis added).

- Fair Labor Standards Act: "[I]t shall be unlawful for any person . . . to discharge or in any other manner discriminate against any employee *because* such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding or has served or is about to serve on an industry committee." 29 U.S.C. § 215(a)(3) (emphasis added).

- Family Medical Leave Act: "It shall be unlawful for any person to discharge or in any other manner discriminate against any individual *because* such individual" has engaged in activity protected by the FMLA. 29 U.S.C. § 2615(b) (emphasis added).

- Genetic Information Nondiscrimination Act: "No person shall discriminate against any individual *because* such individual has opposed any act or practice made unlawful by this chapter or *because* such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. § 2000ff-6(f) (emphasis added).

- National Labor Relations Act: "It shall be an unfair labor practice for an employer . . . to discharge or otherwise discriminate against an employee *because* he has filed charges or given testimony under this subchapter." 29 U.S.C. § 158(a) (emphasis added).

- Occupational Safety & Health Act: "No person shall discharge or in any manner discriminate against any employee *because* such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter." 29 U.S.C. § 660(c)(1) (emphasis added).

- Rehabilitation Act: "No person shall discriminate against any individual *because* such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. § 12203(a) (emphasis added).

- Sarbanes-Oxley Act: No covered company "may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against employee in the terms and conditions of employment *because* of any lawful act done by the employee" to engage in activity protected by the Act. 18 U.S.C. § 1514A(a) (emphasis added).

It is neither necessary nor desirable for the term "because" to connote different standards of causation, where other statutory language does not require this result. E.g., 38 U.S.C. § 4311(c); 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B). Differing meanings create more litigation and frustrate the efforts of employers and employees to regulate their own employment relationships. Accordingly, the *amici* states ask this Court to reverse the Fifth Circuit.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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AMICUS CURIAE BRIEF

No. 12-484

IN THE

Supreme Court of the United States

UNIVERSITY OF TEXAS
SOUTHWESTERN MEDICAL CENTER,
Petitioner,
v.
NAIEL NASSAR, M.D.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

This brief *amicus curiae* is submitted, with the parties' consent,[1] by the National Education Association ("NEA"), a nationwide employee organization with more than three million members, the vast majority of whom are employed by public school districts, colleges, and universities. NEA is strongly committed to opposing and eliminating employment discrimination and firmly supports the vigorous enforcement of Title VII of the Civil Rights Act of 1964, including full enforcement of the statute's anti-retaliation provisions. NEA is concerned that the "but-for" causation standard for retaliation claims that Petitioner urges this Court to adopt is an unsound reading of the statute and would weaken Title VII's protections against employment discrimination.

NEA submits this brief in support of Respondent to address the proper interpretation of Title VII and to rebut policy arguments made in the briefs *amicus curiae* filed by the National School Boards Association ("NSBA") and the American Council on Education and six other higher education organizations (collectively, the "ACE *amici*") in support of Petitioner.

SUMMARY OF ARGUMENT

I. Title VII's motivating factor standard of causation applies to Title VII retaliation claims. In its 1991

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[1] Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than amicus curiae made a monetary contribution to the preparation or submission of this brief.

amendments to Title VII, Congress added Section 2000e-2(m), providing that a violation "is established when complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor" for an adverse employment action. That provision expressly applies to the entire subchapter of the statute—including the anti-retaliation provision, Section 2000e-3(a)—"except as otherwise provided." And nothing in the retaliation provision provides otherwise. Nothing in the text of Section 2000e-3(a) states that the motivating factor standard of Section 2000e-2(m) does not apply. And there is no sound basis for concluding that Section 2000e-3(a) "provide[s] otherwise" by implication. As this Court has long recognized, retaliation for raising complaints regarding discrimination on the basis of a protected characteristic *is* discrimination on the basis of the protected characteristic. Accordingly, Section 2000e-2(m)'s motivating factor standard encompasses Section 2000e-3(a)'s anti-retaliation provision. If an employer engages in retaliation prohibited by Section 2000e-3(a), then, in Section 2000e-2(m)'s terms, "race, color, religion, sex, or national origin was a motivating factor for" the employer's action.

II. There is no merit to the claims by NSBA and the ACE *amici* that adherence to the motivating factor standard in Title VII retaliation cases will impose particular burdens on educational institutions.

A. Adherence to the motivating factor standard for retaliation claims creates no special problems for educational institutions that provide procedural protections for adverse employment actions. The claim that educational institutions are particularly

vulnerable to meritless retaliation claims is, first of all, based on the groundless assumption that significant numbers of education professionals will abuse internal procedures by making unfounded discrimination complaints before their institutions finalize adverse employment actions against them. But even leaving that aside, NSBA and the ACE *amici* are wrong in assuming that the types of meritless retaliation claims that they assume education professionals will make can withstand summary judgment.

B. Neither academic freedom nor recent school reform measures are endangered by adherence to the mixed motive causation standard for retaliation claims.

1. There is no substance to contention that adhering to the motivating factor standard in Title VII retaliation cases, by leading to the disclosure of the reasons for academic employment decisions, endangers academic institution's First Amendment protected academic freedom. The First Amendment protects academic institutions' right to make decisions about who will teach, what subjects will be taught, and how teaching is conducted, but it does not protect institutions from disclosing the reasons for employment actions in Title VII enforcement proceedings.

2. Nor is there any merit to NSBA's claim that the use of the motivating factor standard of causation in retaliation cases entails special problems for elementary and secondary schools that are subject to school reform measures requiring frequent teacher reassignments. As an initial matter, only those actions that are likely to dissuade employees from complaining or assisting in complaints about discrimination can support retaliation claims. Moreover, there is

no reason to suppose that adherence to a motivating factor standard will expose schools to meritless retaliation claims in those instances where school-reform-driven teacher reassignments can be regarded as materially adverse. There is no basis for assuming that teachers who are reassigned as a result of school reform measures will contrive meritless retaliation claims by interposing unfounded discrimination claims prior to their reassignment—or that such contrived claims would, if made, generate significant litigation costs.

ARGUMENT

This case presents a question of statutory interpretation: whether a plaintiff alleging retaliation under Title VII can establish liability by proving that retaliation was a motivating factor for an adverse employment action, or whether such a plaintiff must prove that a retaliatory motive was the but-for cause of the adverse action.

As Respondent has shown, (1) a careful reading of the pertinent Title VII provisions reveals that the motivating factor standard of causation that Congress adopted in its 1991 amendments to the statute applies to retaliation claims (Respondent's Brief at 15-20), and (2) even if that were not the case, the causation standard for Title VII retaliation cases should be governed by the burden shifting scheme developed in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (Respondent's Brief at 15-20). We elaborate on the first of those points in Part I below. In Part II, we address the policy arguments that NSBA and the ACE *amici* advance in support of Petitioner.

I. Title VII's motivating factor standard applies to Title VII's protection against retaliation.

The principal statutory interpretation question presented in this case is whether the Title VII's motivating factor standard of causation applies to the statute's prohibition against discrimination against employees for opposing practices prohibited by Title VII or participating in Title VII proceedings. We submit that the text and structure of Title VII make plain that that the answer to this question is "yes."

In Title VII, Congress prohibited employers from engaging in discrimination "because of [an employee's] race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). And, to ensure the effectiveness of that basic prohibition, Congress also prohibited employers from engaging in discrimination "because [an employee] has opposed any practice" prohibited by Title VII "or ... made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under" Title VII. *Id.* § 2000e-3(a).

In 1991, Congress—reacting to *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)— amended Title VII to add § 2000e-2(m), which it titled "[i]mpermissible consideration of race, color, religion, sex, or national origin in employment practices." That provision states:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment

> practice, even though other factors also motivated the practice. [*Id.*]

On its face, then, Section 2000e-2(m)'s motivating factor standard of causation expressly applies to "this subchapter" "except as otherwise provided." Because the anti-retaliation provision, Section 2000e-3(a), is in the same subchapter, the motivating factor standard applies to it unless the anti-retaliation provision "provide[s] otherwise." A careful reading of the statute shows that it does not.

As an initial matter, there is certainly nothing in the anti-retaliation provision of Section 2000e-3(a) expressly providing that the motivating factor standard of Section 2000e-2(m) does not apply. Given Congress's silence on this matter, the argument against application of the motivating factor standard to the anti-retaliation claims necessarily depends on the notion that Section 2000e-3(a) "provide[s] otherwise" by implication.

There is no sound basis for drawing such an implication. Section 2000e-2(m) provides that liability is established when a plaintiff proves that "race, color, religion, sex, or national origin was a motivating factor" in an adverse employment action. As this Court has long recognized, retaliation for raising complaints regarding discrimination on the basis of a protected characteristic *is* discrimination on the basis of the protected characteristic. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) ("[R]etaliation [for complaining about sex discrimination] is discrimination 'on the basis of sex' because it is an intentional response to the nature of the complaint: an allegation of sex discrimination.");

Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 267 (1969) (holding that 42 U.S.C. § 1982's prohibition against racial discrimination in real property transactions encompassed a claim for retaliation based on "advocacy of [an African American person's] cause" relating to the lease of property).

Section 2000e-2(m)'s motivating factor standard thus encompasses Section 2000e-3(a)'s anti-retaliation provision. If an employer engages in retaliation prohibited by Section 2000e-3(a), then, in Section 2000e-2(m)'s terms, "race, color, religion, sex, or national origin was a motivating factor for" the employer's action.

Consequently, there is no textual reason to suppose that the motivating factor standard of Section 2000e-2(m) does not apply to Section 2000e-3(a) retaliation claims and every reason to suppose that it does. It follows that this Court's decision in *Gross v FBL Financial Services, Inc.*, 557 U.S. 167 (2009), has no application here. In *Gross*, this Court construed the word "because" as used in the Age Discrimination in Employment Act ("ADEA") and concluded that, given the absence of any express provision applying a motivating factor standard such as that set forth in Title VII, the ADEA requires a plaintiff to show but-for causation. Because the text of Title VII shows that retaliation claims are governed by the motivating factor standard—providing a statutory gloss on the use of the word "because" in both Section 2000e-2(a) and Section 2000e-3(a)—*Gross*'s interpretation of "because" for the purposes of the ADEA has no work to do here. Indeed, the suggestion that *Gross*'s interpretation of "because" as

used in the ADEA should apply to Title VII's Section 2000e-3(a) anti-retaliation provision, while the motivating factor provision governs Title VII's 2000e-2(a) anti-discrimination provision, runs afoul of the principle that "[i]dentical words and phrases within the same statute should normally be given the same meaning." *Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224, 232 (2007).

II. Adherence to the motivating factor standard for Title VII retaliation claims would impose no undue burden on educational institutions.

A. The motivating factor standard for retaliation claims creates no special problems for employers that provide procedural protections for adverse employment actions.

NSBA and the ACE *amici* urge that the procedural safeguards that educational institutions typically follow in personnel matters, when combined with the motivating cause standard, make such institutions especially vulnerable to meritless retaliation claims and the litigation expenses such claims entail.[2] NSBA and the ACE *amici* posit that the education profes-

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[2] NSBA cites procedures that elementary and secondary school employers follow when taking adverse employment actions against certain professional employees pursuant to constitutional requirements, state statutory mandates, contractual obligations, and/or school district policies, NSBA Brief at 5, 11-17, while the ACE *amici* point to internal procedures adopted by colleges and universities relating to faculty employment, including those modeled on the *Recommended Institutional Regulations on Academic Freedom and Tenure* developed by the American Association of University Professors, ACE Brief at 13-14. Although these

sionals who have the benefit of such procedures will abuse them by making unfounded discrimination complaints before their institutions finalize adverse employment actions against them; these claims, so the argument continues, will result in retaliation claims that, under a motivating factor standard, will be difficult to dispose of short of trial.

As we show in what follows, this argument is meritless, as it is based entirely on a chain of unwarranted assumptions.

The abuse-of-internal-procedures argument is based, first of all, on broad and unsupported assumptions about the behavior of education professionals who have the benefit of the procedural safeguards summarized in n.2 above. NSBA posits that due process procedures requiring public school employers to "notify employees of forthcoming adverse employment decisions" before those decisions are finally effectuated encourage education professionals to "engage *strategically* in protected activity in anticipation of ... adverse employment decision[s]." NSBA Brief at 5, 8. In the same vein, the ACE *amici* postulate that "disgruntled employees will invoke" college and university grievance procedures "to create the appearance of retaliation." ACE Brief at 14.

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various procedural systems differ to some degree in their particulars, for present purposes, it suffices to note that they share two basic features. First, they require that an employee be provided notice of any contemplated adverse action and of the grounds upon which such action is to be based. Second, they require that the employee be afforded an opportunity to dispute the grounds for the proposed action and/or the appropriateness of the proposed action in light of the employee's conduct.

Amici offer no empirical support for these claims, but instead simply assume an astonishing amount of bad-faith behavior on the part of education professionals. To agree with the proposition that educational institutions are particularly vulnerable to meritless retaliation claims by reason of the procedural safeguards they have adopted, it is necessary to take it on faith that a significant number of education professionals will abuse those procedural safeguards by making groundless discrimination complaints, *after* it is apparent that adverse action is in the offing, and thereby contrive meritless Title VII retaliation claims. That extraordinary and uncharitable set of assumptions strains credulity on its face, and in any event is asserted without any foundation in fact, providing reason enough to reject the abuse-of-internal-procedures argument at the threshold.

But even if we leave the foregoing objection to one side, the abuse-of-internal-procedures argument fails because it also depends on a demonstrably erroneous assumption as to how the courts will treat the type of meritless claims that NSBA and the ACE *amici* assume significant numbers of education professionals will make. Specifically, NSBA and the ACE *amici* contend that under the motivating factor standard for retaliation claims, courts will routinely allow these hypothesized meritless retaliation claims to go forward to trial on the ground that that the timing of the adverse actions is sufficient to establish causation. *See* NSBA Brief at 8 ("[A] mixed motive standard would make summary judgment in ... cases [based on purely strategic protected activities] far more difficult for defendants to obtain, subjecting employers to the expense and time of trials."); *id.* at

12 ("In some cases the timing of such protected activities ... in relation to the adverse actions may create a presumption of causation."); ACE Brief at 14 ("In a mixed-motive regime, the invocation of ... procedures [for raising complaints of discrimination] prior to an adverse employment action could be proof enough to ... compel a trial.").

That proposition is belied by an examination of how courts actually handle claims of the kind postulated by NSBA and the ACE *amici*.

As this Court has made clear, "Employers need not suspend previously planned transfers upon discovering that [an employee has engaged in protected activity], and their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality." *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 272 (2001).[3] In keeping with that admonition, the lower courts routinely conclude that a plaintiff has failed to establish that retaliation motivated an adverse action in those situations where the plaintiff complained about discriminatory conduct only *after* the employer initiated a process leading to adverse action. *See, e.g., Hervey v. Cnty.*

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[3] NSBA over-reads *Clark* in urging that temporal proximity can suffice to establish causation. NSBA Brief at 12. *Clark* establishes that the circumstances in which temporal proximity can establish causation are narrow by emphasizing that the courts "uniformly hold that the temporal proximity must be 'very close'" and pointing to examples to illustrate that the passage of a few months between protected activity and adverse action can render the temporal connection too remote to establish causation. 532 U.S. at 273.

of Koochiching, 527 F.3d 711, 723 (8th Cir. 2008); *Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 95 (2d Cir. 2001).[4]

As the Second Circuit explained in affirming summary judgment to an employer in just such a case: "Where timing is the only basis for a claim of retaliation, and gradual adverse job actions began well before the plaintiff had ever engaged in any protected activity, an inference of retaliation does not arise." 248 F.3d at 95. The court's application of this principle is instructive here:

> [Plaintiff] claims that his placement on probation and his subsequent firing followed his complaints closely enough to support an inference of retaliation. It is, of course, true that temporal proximity can demonstrate a causal nexus. But in this case

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[4] *See also Wofsy v. Palmshores Ret. Cmty.*, 285 F. App'x 631, 635 (11th Cir. 2008) ("Because Wofsy received warnings months before he made his request for accommodation that his hours and position could change if he did not accept the new driver position, Wofsy failed to establish a causal connection between his demotion and his request."); *Weston–Brown v. Bank of Am. Corp.*, 167 F. App'x 76, 81 (11th Cir. 2006) ("[W]hen an employer makes a tentative decision before protected activity occurs, the fact that an employer proceeds with such a decision is *not* evidence of causation."); *Nicastro v. N.Y. City Dep't of Design & Constr.*, 125 F. App'x 357, 358 (2d Cir. 2005) ("Although 'temporal proximity can demonstrate a causal nexus,' such proximity must be close. And '[w]here timing is the only basis for a claim of retaliation, and gradual adverse job actions began well *before* the plaintiff had ever engaged in any protected activity, an inference of retaliation does not arise.'" (Citations omitted)).

> the adverse employment actions were both part, and the ultimate product, of "an extensive period of progressive discipline" which began when [the employer] diminished [plaintiff's] job responsibilities a full five months prior to his [protected activity]. [*Id.* (citation omitted).]

Addressing the same issue, the Eighth Circuit likewise held that:

> Generally ... more than a temporal connection between the protected conduct and the adverse employment action is required to present a genuine factual issue on retaliation. The wisdom of this rule is evident in a case such as this, where the employee was accused of insubordination before she notified the employer of her protected activity. Insubordinate employees may not insulate themselves from discipline by announcing an intention to claim discrimination just before the employer takes action. [*Hervey*, 527 F.3d at 723 (citations and internal quotation marks omitted).]

The appellate decisions cited above—and the raft of similar trial court decisions that we refrain from citing so as not to belabor the point—refute the assumption that meritless retaliation claims pose any particular danger to educational institutions under the motivating cause standard.

Nor is the line of authority discussed above the only bulwark against meritless retaliation claims of the kind postulated by NSBA and the ACE *amici*. At the most basic level, the lower courts hold that a plaintiff raising a Title VII retaliation claim based on opposition to discriminatory practices (*e.g.*, an

internal complaint regarding discrimination) must prove a good-faith, objectively reasonable, belief that the employer in fact engaged in conduct that violates Title VII.[5] "Because the analysis for determining whether an employee reasonably believes a practice is unlawful is an objective one, the issue may be resolved as a matter of law." *Jordan*, 458 F.3d at 339.

This threshold requirement for retaliation cases—while not calling for proof that the complained-of conduct actually violates Title VII—does demand evidence to support an objectively reasonable belief that the employer engaged in unlawful discrimination. It certainly is a stringent enough standard to permit courts to reject "meritless" retaliation claims based purely on the "strategic use of protected activity" before trial.

In sum, the courts have ample tools for weeding out the kinds of "meritless" retaliation claims that NSBA and the ACE *amici* raise as a potential concern, without the addition of a but-for causation requirement.

B. Neither academic freedom nor recent school reform measures are endangered by adherence to the motivating factor standard for retaliation claims.

NSBA and the ACE *amici* also argue that adhering to the motivating factor standard in Title VII retaliation

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[5] *See, e.g.*, *Morales-Cruz v. Univ. of P.R.*, 676 F.3d 220, 227 (1st Cir. 2012); *McGrath v. Clinton*, 666 F.3d 1377, 1380 (D.C. Cir. 2012); *Barker v. Mo. Dep't of Corr.*, 513 F.3d 831, 834 (8th Cir. 2008); *Jordan v. Alternative Res. Corp.*, 458 F.3d 332, 338 (4th Cir. 2006); *Byers v. Dallas Morning News*, 209 F.3d 419, 428 (5th Cir. 2000); *Learned v. City of Bellevue*, 860 F.2d 928, 932 (9th Cir. 1988).

cases threatens certain institutional prerogatives and imperatives. Specifically, the ACE *amici* claim that use of that standard for retaliation claims entails judicial "intrusion" into academic employment "in a manner that will endanger academic freedom." ACE Brief at 13, 17. For its part, NSBA contends that use of the motivating factor standard will interfere with state and federal school reforms insofar as their implementation involves teacher reassignments. Neither claim withstands scrutiny.

1. The judicial "intrusion" into institutions' academic freedom that the ACE *amici* assert will be occasioned by adherence to a motivating factor standard consists entirely of this: in cases where a plaintiff demonstrates that retaliation was a motivation for an adverse employment decision, "academic institutions will be forced to *disclose* and submit to judicial scrutiny sensitive academic matters that the First Amendment protects." ACE Brief at 13 (emphasis added). *See also id.* at 17 (contending that adherence to the mixed motive standard "would force [educational] institutions to disclose and explain the constitutionally protected reasons for their actions.").[6]

This contention fundamentally misconceives what the First Amendment does and does not protect against in this setting.

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[6] Like the arguments addressed in Part I.A above, the "academic freedom" argument also rests on the purported ease with which plaintiffs can "advance *meritless* retaliation claims," ACE Brief at 17, under a motivating cause standard. We have already shown that it is not, in fact, easy to advance such meritless claims.

It is certainly correct that educational institutions have the freedom to set academic priorities—"to make decisions about how and what to teach," *Bd. of Regents of Univ. Wis. Sys. v. Southworth*, 529 U.S. 217, 237 (2000) (Souter, J., concurring in judgment)—and to make decisions on staffing based upon these independently determined academic priorities, *Sweezy v. State of N.H. by Wyman*, 354 U.S. 234 (1957). Those incidents of academic freedom come into play as "against governmental attempts to influence the content of academic speech through the selection of faculty or by other means." *Univ. of Pa. v. EEOC*, 493 U.S. 182, 198 (1990).

But academic freedom does *not* protect educational institutions from disclosing those priorities to show that an adverse employment was based on legitimate academic reasons, and not discriminatory or retaliatory reasons. That is the lesson of *University of Pennsylvania*, *supra*, where this Court squarely rejected the claim that higher education institutions have "an *expanded* right of academic freedom to protect confidential peer review materials from disclosure" pursuant to a subpoena issued by the Equal Employment Opportunity Commission in Title VII enforcement proceedings. *Id.* at 199. This Court's reasons for doing so are sound and apply with full force to the "academic freedom" argument here.

First, any "infringement" on academic freedom owing to the disclosure of the reasons for academic personnel decisions "is extremely attenuated." *Id.* Disclosure of the reasons for taking a particular employment action does not, of course, directly

impinge on an institution's decisions as to who will teach, what subjects will be taught, or how teaching will be conducted. *Id.* at 198. The most that can possibly be said is that the possibility of disclosure "undermines the confidentiality" of the decision-making process in such a way as to inhibit candid discussion. *Id.* at 199. As this Court aptly concluded, "To verbalize the claim is to recognize how distant the burden is from the asserted right." *Id.* at 200.

Second, any putative "injury to academic freedom" arising from such disclosure "is also speculative." *Id.* As this Court found in relation to the tenure review process, "confidentiality is not the norm" in tenure decisions, and "some disclosure of peer evaluations would take place" regardless of Title VII litigation. *Id.* What is true of tenure decisions is, if anything, even more true of discipline and discharge decisions. Indeed, the very procedural safeguards that the ACE *amici* highlight in their brief require that academic institutions, before discharging or disciplining faculty members, provide (1) notice of "specific charges," (2) a hearing that can be open to the public, and (3) the production of documents and other evidence by the institution.[7] To the extent that an academic institution can be said to suffer any injury from disclosing its reasons for an adverse employment action, it is fanciful to suppose that subsequent re-disclosure of those reasons in a Title VII lawsuit will augment that injury in any meaningful way.

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[7] *See* AAUP, *Recommended Institutional Regulations on Academic Freedom and Tenure* at 5-6, available at http://www.aaup.org/file/regulations-academic-freedom-tenure.pdf.

Finally, there is no substance to the contention that adherence to the motivating factor standard in retaliation cases places "[j]udges and juries in a position to second-guess academic decisions concerning tenure, administrative appointments, or research funding." ACE Brief at 13. To state the obvious, in a Title VII retaliation case, the issue is not whether an institution's academic reasons for taking an adverse action were themselves sound as a matter of academic policy; it is whether an impermissible retaliatory motive was a factor in the decision to take the action. Nothing in that inquiry goes to the soundness or unsoundness of "*legitimate* academic decisionmaking." *Univ. of Pa.*, 493 U.S. at 199. *See also id.* at 1998 ("The Commission is not providing criteria that petitioner must use in selecting teachers. Nor is it preventing the University from using any criteria it may wish to use, except those-including race, sex, and national origin-that are proscribed under Title VII.").

In sum, the First Amendment quite simply does not protect academic institutions against disclosure of their reasons for taking adverse employment actions in Title VII proceedings. Accordingly, there is no merit to the contention that adherence to the motivating factor standard threatens the academic freedom of educational institutions.

2. There is no substance to NSBA's claim that the use of the motivating factor standard of causation in retaliation cases entails "special problems" for elementary and secondary schools, once again in the form of the potential for "meritless" retaliation claims, in light of recent school reform measures that lead to frequent teacher reassignments.

As an initial matter, it must be stressed that not every reassignment is an adverse action that can support a Title VII retaliation claim. Rather, only materially adverse actions—those that "are likely to dissuade employees from complaining or assisting in complaints about discrimination"—can support retaliation claims. *Burlington Northern & Santa Fe Railway Co. v White*, 548 U.S. 53, 70 (2006). Moreover, there is no reason to suppose that adherence to the motivating factor standard will expose schools to meritless retaliation claims in those instances where school-reform-driven teacher reassignments can be regarded as materially adverse. For the reasons set forth in Part II.A above, there is no basis for assuming that teachers who are reassigned as a result of school reform measures will contrive meritless retaliation claims by interposing unfounded discrimination claims prior to their reassignment—or that such contrived claims would, if made, generate significant litigation costs.

CONCLUSION

For the forgoing reasons, *amicus* NEA requests that this Court conclude that Title VII's motivating factor standard applies to Title VII retaliation claims.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 12-484

In The
Supreme Court of the United States

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, *Petitioner,*

v.

NAIEL NASSAR, M.D., *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS ET AL., IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

Amici[1] are the National Employment Lawyers Association, the Leadership Conference on Civil and Human Rights and 18 organizations committed to furthering the goals of Title VII of the Civil Rights Act of 1964, and of statutes modeled on Title VII, to prevent and redress the effects of employment discrimination in workplaces across the nation. To that end, *Amici* are committed to providing assistance to the Court in maintaining standards of proof and causation that further these goals and that make sense to employees, employers, judges, and juries. The individual organizations are described in detail in the attached Appendix.

Federal courts continue to grapple with causation issues under federal employment discrimination statutes, sometimes reaching results out-of-step with the Court's foundational rulings and in conflict with Congress' intent in passing these laws. When these conflicts occur, employees' ability to prove unlawful discrimination is unduly restricted. Because the Court's decision in this case will directly affect the rights of employees who suffer workplace retaliation, the Court should take this opportunity to clarify its Title VII jurisprudence.

Amici respectfully submit that our day-to-day experience in employment discrimination litigation

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[1] Pursuant to Sup. Ct. R. 37.6, *Amici* submit that no counsel for any party participated in the authoring of this document, in whole or in part. In addition, no other person or entity, other than *Amici*, has made any monetary contribution to the preparation and submission of this document. Pursuant to Sup. Ct. R. 37.2, letters consenting to the filing of this Brief have been filed with the Clerk of the Court.

and advocacy can assist this Court in resolving the issues before it. In particular, *Amici* are intimately familiar with the way in which lower courts have struggled to apply a consistent approach to proving intentional discrimination. This struggle is embodied in lower courts' confusion in applying *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009), in light of the Court's prior rulings in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality decision); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981); and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

SUMMARY OF ARGUMENT

If employees' ability to claim and prove unlawful discrimination is subject to arbitrary and unreasonably high limits, Title VII's substantive protections and prohibitions ring hollow. The Court has repeatedly recognized this vital principle in a consistent line of cases extending from *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), through *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), and most recently in *Thompson v. N. Am. Stainless*, 131 S. Ct. 863 (2011). Specifically, the Court has held that to effectively enforce Title VII's bar on discrimination, Title VII's antiretaliation provision must be broadly interpreted to ensure "unfettered access to statutory remedial mechanisms." *Robinson*, 519 U.S. at 346. *See Burlington N.*, 548 U.S. at 67. The Court has broadly construed the retaliation provisions of other

antidiscrimination laws modeled on Title VII. The Court has also found that retaliation is actionable even under antidiscrimination statutes that lack explicit antiretaliation provisions.

It is against this backdrop of the Court's robust protection against retaliation that the Court must view the issue before it: whether the "motivating factor" standard for establishing intentional discrimination based upon race, color, religion, sex, or national origin, added to Title VII in Section 703 of the 1991 Civil Rights Act, is different from the standard for proving unlawful retaliation under Title VII. *See* 42 U.S.C. §§ 2000e-2(m); 2000e-3(a) (2006). For these two closely related forms of intentional discrimination, Petitioner argues there should be different standards: one for proving the underlying discrimination and another, higher standard for proving retaliation. This argument makes no sense, either in the abstract or in practice, where it would confuse employers, employees, judges and juries. Petitioner's framing of the issue furthers this confusion. That is, Petitioner mistakenly attempts to divide employment discrimination cases into two categories: cases where discrimination is the only motive, and cases where discrimination is one of several motives driving an adverse employment decision. This framing ignores how the Court has addressed discrimination since the passage of the Civil Rights Act of 1964, while simultaneously ignoring the realities of the workplace and how employment decisions are made.

In resolving the issue presented, the Court should continue to reiterate, and indeed clarify, the principle it has applied since Title VII's passage: "it

is abundantly clear that Title VII tolerates no . . . discrimination, subtle or otherwise." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973). Furthering this principle and entirely consistent with it, *Amici* ask the Court to expressly hold that Section 703(m)'s "motivating factor" standard is the appropriate causation standard in Title VII retaliation claims.

To be clear, this standard does not mean that Title VII is violated simply because the illegal consideration was in the air. The illegal consideration must have played a role in the adverse employment action. The Court has consistently held that the law is violated only when a protected characteristic, here the right to be free from retaliation, affects the employment decision. However, the Court has made it abundantly clear that while the illegal consideration must make a difference in an employment action, it need not be the sole factor. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 284 (1989) (plurality decision) (Kennedy, J., dissenting) ("No one contends, however, that sex must be the sole cause of a decision before there is a Title VII violation. This is a separate question from whether . . . [it] must be *a* cause . . . . [E]ither by itself or in combination with other factors, it made a difference to the decision."). The Court's decisions merely reflect the workplace reality that adverse employment decisions often have multiple motives.

Congress reiterated and codified the Court's view that multiple considerations can, and do, influence employment decisions when it added "motivating factor" language to Title VII in the Civil

Rights Act of 1991. "Section 5 of the Act responds to *Price Waterhouse* by reaffirming that any reliance on prejudice in making employment decisions is illegal." H.R. REP. NO. 102-40 (II), at 2-3 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 695.

There is nothing in the Court's treatment of retaliation as an unlawful practice under Title VII, in the 1991 amendments, or in the legislative history of Title VII that reasonably leads to the conclusion that there should be one standard of causation for proving intentional discrimination based upon a protected classification, and another, higher standard for proving retaliation. To the contrary, by recognizing how vital Title VII's antiretaliation provision is to securing Title VII's antidiscrimination rights, the Court has consistently interpreted the antiretaliation provision more broadly than its antidiscrimination counterpart.

The decision in *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009) did nothing to change this history and does not counsel a different result. *Gross* held that Title VII's analysis could not be imported to Section 623 of the ADEA because that provision does not contain a "motivating factor" standard. *Id.* at 174. Here, however, that reasoning does not apply because "motivating factor" language is included within Title VII.

Imposing different standards for proving intentional discrimination under the same statute will only create confusion for the parties, courts, and juries. This concern is not merely theoretical, but practical; individual claims of retaliation, as well as mixed discrimination-retaliation cases have increased over the past decade.

The Court should clarify that if retaliation is a motivating factor for the adverse employment action, then the employer has violated the law, subject to the limited same decision defense set forth in Title VII. Ensuring that illegal factors are not considered in employment decisions will honor the intent and purpose of Title VII.

ARGUMENT

I. The Court Has Consistently Recognized The Vital Importance Of Broadly Interpreting The Antiretaliation Provision To Protect The Antidiscrimination Rights Contained In Title VII

The antiretaliation provision of Title VII is a crucial component of Congress' goal to protect a plaintiff's substantive right to challenge discrimination. For this reason, the Court has vigorously protected an employee's right to be free from retaliation. Specifically, the Court has consistently construed the antiretaliation provision broadly, explaining that it must extend beyond the discrimination provision to ensure employees the full protection of Title VII. *See, e.g., Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 555 U.S. 271 (2009); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006) ("Interpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act's primary objective depends.").

The importance of the antiretaliation provision cannot be overstated. The provision's primary purpose is to secure compliance with the other provisions of Title VII, and it must be

interpreted in the context of Title VII's broader statutory scheme. Thus, although the prohibition on discrimination and antiretaliation provisions differ in purpose, they complement each other and should be read together. *See Burlington N.*, 548 U.S. at 63, 75 (Alito, J., concurring).

To that end, the Court has interpreted the protections of the antiretaliation provision to cover "a broad range of employer conduct." *Thompson v. N. Am. Stainless*, 131 S. Ct. 863, 868, 870 (2011) (citing *Burlington N.*, 548 U.S. 53 (2006)) (applying the protections of the antiretaliation provision to third parties who are in the zone of interests that Title VII seeks to protect); *see also Burlington N.*, 548 U.S. at 63, 67 (applying the protection of Title VII's antiretaliation provision to events that occur outside the workplace).

Moreover, the Court has recognized that retaliation is actionable even under statutes that do not expressly provide such protection. *See Gomez-Perez v. Potter*, 553 U.S. 474, 481 (2008) ("[W]e interpret the ADEA federal-sector provision's prohibition of 'discrimination based on age' as likewise proscribing retaliation."); *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 457 (2008) ("We consequently hold that 42 U.S.C. § 1981 encompasses claims of retaliation."); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005) ("Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action.").

The Court's broad construction of antiretaliation protections under federal

employment discrimination statutes mirrors the Court's forceful protection of retaliation claims in other areas of federal employment law. *See N.L.R.B. v. Scrivener*, 405 U.S. 117, 121-22 (1972) (recognizing that retaliation is protected under the National Labor Relations Act); *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) ("By the proscription of retaliatory acts set forth in [the Fair Labor Standards Act], . . . Congress sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced.").

The Court should continue protecting an employee's right to be free from workplace retaliation in the instant case.

II. Considering The Court's Robust Protection Against Retaliation, The Court Should Hold That Section 704 Is Violated If Retaliation Is A Motivating Factor For An Adverse Employment Decision

Title VII's principal substantive provision, Section 703, prohibits employment decisions made "because of [an] individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (2006). The Court has interpreted "because of" with an express recognition that adverse employment decisions are often made based on a combination of legitimate and illegitimate motives. Congress codified this understanding when it amended Title VII by adding "motivating factor" language. "[T]he Committee intends to restore the rule applied by the majority of the circuits prior to the *Price Waterhouse* decision that any discrimination that is actually shown to play a role in a contested employment

decision may be the subject of liability." H.R. REP. NO. 102-40 (II), at 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 711.

Section 704 of the same statute prohibits discrimination against an employee, "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing . . . ." 42 U.S.C. § 2000e-3(a). Since Congress intended for Tit' VII's two key antidiscrimination provisions to be read together, there was no need for Congress to separately amend Section 704 in the 1991 amendments. Now this Court must determine whether Title VII's language provides one set of standards for proving intentional discrimination based upon a protected characteristic and a separate, higher standard for proving intentional retaliation.

A fair reading of Title VII's text after the 1991 amendments should lead to the conclusion that the law is violated if an illegitimate consideration is a "motivating factor" in an adverse employment decision—regardless of whether that illegal consideration is the intent to discriminate based upon, for example, sex or unlawful retaliation. Resp't. Br. at 12, 16-19. *See generally* Br. of Emp't Law Professors of *Amici Curiae* in Support of Resp't.

Beyond that, however, this conclusion is compelled when the language of Section 704 is read in the context of the Court's robust protection of the right to be free from workplace retaliation and the legislative history of the Civil Rights Act of 1991. Even *Amici* for the Petitioner agree that "[t]he issue that confronts the Court is, at its core, one of

Congressional intent . . . ." Br. of *Amicus Curiae* The Voice of the Defense Bar in Support of Pet. at 6. To the extent there is a question regarding whether Section 703(m) should be interpreted to apply to retaliation claims, the Court has emphasized that "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, *and the broader context of the statute as a whole*." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (emphasis added); *see also Dada v. Makasey*, 554 U.S. 1, 16 (2008) ("In reading a statute we must not look merely to a particular clause, but consider in connection with it the whole statute."). Thus, as this Court recently recognized, if a clause "read in isolation, leaves room for doubt," it is appropriate to consider the "the context and history" of the statute. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1615 (2010). Honoring these standards, the Court should clarify that Section 703(m)'s "motivating factor" causation standard applies to claims of retaliation.

In holding that Section 703(m)'s "motivating factor" causation standard applies to Section 704, and to avoid further confusion, the Court should reiterate what it has consistently recognized: employment actions often have multiple causes and proof of intentional discrimination under Title VII does not require proof of a *sole* cause.

A. The Court Should Reject The Number Of Motives As A Criterion For Distinguishing Causation Because All Cases Are *Potentially* Multiple Motive Cases

"Mixed-motive" has become a term of art that has nothing to do with the number of motives an employer actually has for taking a specific employment action.[2] Courts need not distinguish between cases involving multiple motives and cases involving a single motive, because nothing in the statute rests on that distinction. Indeed, the Court in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), explicitly rejected the suggestion that a plaintiff must demonstrate that discrimination was the "sole cause" of the contested employment action under Section 2000e-2(a)(1). Relying on *McDonnell Douglas*, the Court held:

> The use of the term "pretext" in this context does not mean, of course, that the Title VII plaintiff must show that he would have in any event been rejected or discharged *solely* on the basis of his race . . . as [*McDonnell Douglas*] makes clear, no more is required to be shown than that race was a "but for" cause.

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[2] With this usage, if a case is deemed a "mixed-motive" case, at the summary judgment stage, the focus is directed at proving that a protected characteristic was a motivating factor in the decision to take an adverse action. At trial, on the other hand, multiple motive cases require proof that an illegal reason was a motivating factor, subject to the limitations of the same decision affirmative defense. The determination of whether to apply a *McDonnell Douglas* burden shifting analysis or a "mixed-motive" analysis is generally based on the evidence adduced during the course of the litigation.

McDonald, 427 U.S. at 282 n.10 (emphasis added) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973)).

Employment cases often involve multiple motives. Using the term "single-motive" or "pretext" to describe a case brought pursuant to Section 703 as opposed to "mixed-motives" to describe a case where the same decision affirmative defense is available is therefore inaccurate. This inaccurate use of "single-motive" and "pretext" fails to differentiate the case where the affirmative defense is available from one where it is not.

In every case the jury may decide: 1) that the legitimate reason motivated the employer, and that the illegal reason did not; 2) that the illegal reason motivated the employer and the legitimate reason did not, but was merely pretext; *or* 3) that both the illegal and legitimate reason motivated the employer. In this sense, every case is *potentially* a multiple or "mixed-motive" case. Indeed, Petitioner concedes this point. Pet. Br. at 32.

It is impractical and confusing to conclude that the number of motives involved determines the applicable culpability standard. Under both the "motivating factor" and "but-for" standard of causation, the number of causes involved is irrelevant because neither standard requires an employee to prove that an illegal reason was the only or sole reason for an adverse action. *See* discussion *infra* Section II.B. Instead, because every employment discrimination case potentially involves multiple motives, the relevant inquiry should be whether an illegal motive, even alongside other, legitimate motives, impacted the ultimate

employment decision. As Justice Kennedy articulated in his *Price Waterhouse* dissenting opinion, "[t]he words of Title VII are not obscure. . . . By any normal understanding, the phrase 'because of' conveys the idea that the motive in question made a difference to the outcome." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 281 (1989).

Congress explicitly recognized that employment decisions usually involve multiple motives, but that a discriminatory "motivating factor" should never be tolerated and must be purged entirely from the employment process. "[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (2006).[3]

Amici are not asking the Court to adopt a new standard of causation, rather, we ask the Court to affirm the standard adopted by the Civil Rights Act of 1991, which reflects similar standards used by the appellate courts before *Price Waterhouse* was

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[3] In *Price Waterhouse*, 490 U.S. at 241 n.7, the Court pointed out that when considering the bill that eventually became Title VII, "Congress specifically rejected an amendment that would have placed the word 'solely' in front of the words 'because of'" in § 2000e-2(a)(1). *Id.* (citing 110 CONG. REC. 2728, 13837 (1964)). As Senator Clifford Case, the Republican floor manager of Title VII, stated in explaining why such a requirement should be rejected, "[i]f anyone ever had an action that was motivated by a single cause, he is a different animal from any I know of." 110 CONG. REC. 13, 837-38 (1964). Adding the word "solely" to Title VII would, according to Senator Case, "render Title VII nugatory." *Id.*

decided. More than a decade before the phrase "motivating factor" was used in *Price Waterhouse*, the Supreme Court acknowledged that the law is violated when an unlawful consideration joins with one or more lawful considerations to cause harm. *See, e.g., Bd. of Cnty. Comm'rs, Wabaunsee Cnty., Kan. v. Umbehr*, 518 U.S. 668, 674 (1996); *Hunter v. Underwood*, 471 U.S. 222, 228 (1985); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 n.21 (1977). The courts also applied this type of analysis in Title VII cases. For example, in *Fadhl v. City & Cnty. of San Francisco*, 741 F.2d 1163, 1166 (9th Cir. 1984) (Kennedy, J.), the Ninth Circuit reasoned that,

> Where employment discrimination affects the applicant's score or the evaluative process, it suffices to impose initial liability to find that [the protected characteristic] was a significant factor in the decision . . . . *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S. Ct. 1089, 1095, 67 L.Ed. 2d 207 (1981) (plaintiff may succeed "by persuading the court that a discriminatory reason more likely motivated the employer"); *Whiting v. Jackson State Univ.*, 616 F.2d 116, 121 (5th Cir. 1980); *Barnes v. Costle*, 561 F.2d 983, 990 (D.C. Cir. 1977).

Courts are adept at handling cases with multiple motives and have applied the "motivating factor" standard routinely in Title VII cases. Despite

Petitioner and its supporting *Amici*'s policy argument to the contrary, Congress codified the motivating factor analysis in the Civil Rights Act of 1991. Petitioner fails to explain how applying this same analysis to retaliation will cause any difficulty.

Despite the confusion among the lower courts regarding the proper application of Title VII,[4] the plain language of the Civil Rights Act of 1991 does not distinguish between cases involving a single motive or multiple motives. The language of the statute does not permit the application of the "motivating factor" standard *only* when other factors also motivated the employer's decision. Rather, it applies *even though* or *regardless of whether* other factors motivated the employer's decision. *See* 42 U.S.C. § 2000e-2(m).

B. The Causation Standard Under Title VII's Antiretaliation Provision Does Not Require A Showing Of Sole Cause

At its heart, this case requires the Court to determine how much intentional workplace retaliation an employee must endure—not how many causes there must be for the adverse action—before

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[4] *See, e.g., Ginger v. District of Columbia*, 527 F.3d 1340, 1345-46 (D.C. Cir. 2008), *overruled by Ponce v. Billington*, 679 F.3d 840, 844 (D.C. Cir. 2012) (explaining that Title VII provides two ways to establish liability: "single-motive" or "pretext" theory, and a "mixed-motive" theory); *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 396 (6th Cir. 2008) (stating discrimination claims "are traditionally categorized as either single-motive claims . . . or mixed-motive claims"); *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 855 (9th Cir. 2002) (en banc), *aff'd*, 539 U.S. 90 (2003) (stating *McDonnell Douglas* may be used "where a single motive is at issue . . . [or in] a circumstance in which mixed motives are at issue.").

Title VII is violated. Thus, retaliation need not be the sole cause and the law may be violated if retaliation played a role in the employment decision, even though other, legitimate motives were also in play. Petitioner's argument, while confusing, clearly demonstrates its belief that "but-for" cause means sole cause. Petitioner references the "solely by reason of" language in Section 504 of the Rehabilitation Act, explaining that this standard "is at least as strict a standard as but-for causation." Pet. Br. at 29. Why draw this parallel at all unless the Petitioner's true contention is that the standard must be sole cause? Petitioner's *Amici* reinforce this point where, for example, they cite to *Abrams v. Lightolier Inc.*, 50 F.3d 1204 (3d Cir. 1995) to illustrate the difference between "but-for" and "motivating factor" jury instructions while emphasizing that the protected characteristic has to be "the sole motivating factor . . . ." Br. of *Amicus Curiae* The Voice of Defense Bar in Support of Pet. at 18. Sole cause is a wholly inappropriate standard and one the Court has never required.

The principal substantive provision of Title VII prohibits adverse employment actions "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (2006). This provision is consistent with the antiretaliation provision of Title VII, which does not contain any restrictive language signifying congressional intent to limit the analysis to sole cause culpability. As noted above, when Congress enacted Title VII, it purposefully rejected an amendment where the word "solely" was placed in front of the words "because of." *See* 110 CONG. REC. 2728, 13837 (1964); *see also*

Price Waterhouse, 490 U.S. 228, 241 n.7 (1989). In fact, with one exception, [5] none of the federal employment discrimination statutes contain any language suggesting a requirement to show sole cause.[6]

The Justices who directly addressed this point in *Price Waterhouse* all agreed that the "because of" language under Title VII does not mean sole cause. Justice Brennan, writing for the plurality, stated unequivocally that "we know that the words 'because of' do not mean '*solely* because of' . . . ." *Price Waterhouse,* 490 U.S. at 241. In his concurrence, Justice White noted that the Court previously rejected a sole cause standard. *Id.* at 259. Justice O'Connor, in her concurrence, reiterated that the

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[5] Section 504 states that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be . . . subjected to discrimination . . . ." 29 U.S.C. § 794(a) (2006).

[6] In 1990, moreover, Congress explained that "sole cause" is the causation standard under neither the ADA nor Section 504 because "literal reliance" on 504's phrasing "leads to absurd results." S. REP. NO. 101-116, 142-43 (1989); *see also* H.R. REP. NO. 101-485 (II), 85-86 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 368 ("In sum, the existence of non-disability related factors in [an adverse employment] decision does not immunize employers. The entire . . . procedure must be reviewed to determine if the disability was improperly considered[,]" discussing with approval *Pushkin v. Regents of the Univ. of Colo.*, 658 F.2d 1372, 1386-87 (10th Cir. 1981)). Hence, despite off-base suggestions to the contrary, *see* Pet. Br. at 29, causation standards under one or more of the Rehabilitation Act's multiple antidiscrimination provisions is not before the Court in this case, and thus, need not and should not be addressed, but rather, should be subject to a "careful and critical" examination in another appropriate case. *See Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 374 (2009).

Court previously rejected attempts to require the plaintiff to prove sole cause under Title VII. Indeed, Justice O'Connor noted that "[r]arely can it be said that . . . a decision [is] motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one." *Id.* at 268. Furthermore, Justice Kennedy understood and agreed that Title VII's causation standard did not require the plaintiff to demonstrate that the protected characteristic was the sole reason for the adverse employment decision. Instead, Justice Kennedy proposed that "[the protected characteristic] is a cause for the employment decision whenever, either by itself or in combination with other factors, it made a difference to the decision. *Discrimination need not be the sole cause in order for liability to arise . . . .*" *Id.* at 284 (emphasis added).

The Court has noted that "because of" provides for the balancing of multiple motives. *Id.* at 241; *see also Fadhl v. City & Cnty. of San Francisco*, 741 F.2d 1163, 1165 (9th Cir. 1984) (Kennedy, J.) (holding that liability is imposed against a defendant where "sex was *a significant factor* in the [employment] decision . . . .") (emphasis added). The Court has consistently found that a violation of Title VII can occur where the adverse action was "because of" discrimination or retaliation, although other causes may have existed.

Even *Gross*, upon which Petitioner and its supporting *Amici* strongly rely, did not define "but-for" causation as sole cause, reiterating the workplace reality that adverse employment actions can have multiple motives. "[T]he burden of

persuasion necessary to establish employer liability is the same in alleged mixed-motive cases as in any other ADEA disparate-treatment action." *Gross*, 557 U.S. at 177.

The Court in *Gross* began by stating that "[t]he ordinary meaning of the ADEA's requirement that an employer took an adverse action 'because of' age is that age was the 'reason' that the employer decided to act." *Id.* at 176. Crucially, the Court then referenced its previous decision in *Hazen Paper Co. v. Biggins* to further explain its understanding of the "but-for" standard: "[T]he employee's protected trait actually played a role in [the employer's decisionmaking] process *and had a determinative influence on the outcome*." *Gross*, 557 U.S. at 176 (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)). The Court in *Gross* essentially highlighted that the illegitimate consideration must be significant enough to be "determinative." Even this narrow interpretation of the "because of" standard under the ADEA provides for multiple motives and does not require the language to be interpreted as "solely by reason of." *Cf.* Pet. Br. at 29.

Despite the appearance of differing culpability standards under "but-for," "because of," and "motivating factor," one thing remains clear: a plaintiff is not required to show that an illegal motive was the "sole cause" of an adverse employment action. To curtail any continuing confusion, *Amici* ask the Court to affirmatively "banish the word 'sole' from [the] Title VII lexicon." *Ponce v. Billington*, 679 F.3d 840, 846 (D.C. Cir. 2012).

C. The Court Should Clarify That The Causation Standard For Title VII Retaliation Claims Is Section 703(m)'s "Motivating Factor" Standard

In light of the Court's consistent and robust protection of employees from workplace retaliation and the legislative history of the Civil Rights Act of 1991 discussed *infra* at Section III, *Amici* urge the Court to clarify that the appropriate causation standard for Title VII retaliation claims is the same as that for violations of Title VII's principal antidiscrimination provision. Therefore, the Court should adopt Section 703(m)'s "motivating factor" standard and should apply the same decision defense from Section 706(g)(2)(B)(i) to retaliation claims.

Congress added the "motivating factor" language to Title VII to eliminate the confusion surrounding the causation standard for intentional discrimination. To give effect to Congress' intent, this single standard should be applied to all cases under Title VII, including claims under the antiretaliation provision.

Through the 1991 amendments, Congress sent a clear message that discrimination or retaliation must not motivate an adverse employment action. The intent was to entirely remove illegal considerations from the employment equation. Congress also recognized, however, that the law should not allow monetary damages for economic harms when the unlawful action resulted in no economic loss; this is why Congress codified the same decision defense as a limitation on remedies. The two concepts strike a tight balance. They protect

employees by guaranteeing a workplace free from discrimination and retaliation, while simultaneously protecting employers who can prove that the illegal consideration did not affect their ultimate decision.

The issue before the Court is whether the "motivating factor" language in Title VII's substantive provision applies in cases of retaliation. Petitioner and its supporting *Amici* attempt to focus the Court on the supposed problems associated with shifting the burden of proof to the employer, but this is a point Congress has already addressed.

Price Waterhouse introduced a burden shifting proof structure that allowed an employer to "avoid a finding of liability only by proving . . . that it would have made the same decision even if it had not taken the plaintiff's gender into account." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989). Congress disagreed with the Court's decision to absolve employers completely of liability when the plaintiff had established intentional discrimination. Therefore, by enacting the Civil Rights Act of 1991, Congress mandated that if the plaintiff proves intentional discrimination, the burden shifts to the employer to prove the same decision defense. However, if the employer succeeds in establishing that it would have made the same decision absent an illegal consideration, such proof does not absolve the employer of liability, but only limits the relief available to the employee. *See infra* Section III; 42 U.S.C. § 2000e-5(g)(2)(B) (2006). The speculative problems raised by Petitioner and its supporting *Amici* surrounding the burden shifting analysis in Title VII cases have long been resolved by Congress.

III. Under Title VII, Consideration Of The Protected Characteristic Was To Play No Role In The Adverse Employment Decision

In enacting the Civil Rights Act of 1991, Congress had two primary purposes. First, Congress reaffirmed its commitment to the fundamental tenets of Title VII: to "eradicate discrimination in the workplace" by condemning and "prohibit[ing] all invidious discrimination of sex, race, color, religion, or national origin in employment decisions." H.R. REP. NO. 102-40 (II), at 17 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 710. *See McKennon v. Nashville Banner Publ. Co.*, 513 U.S. 352, 357 (1995). President Bush, who signed the Civil Rights Act of 1991 into law, concurred, noting that "discrimination whether on the basis of race, national origin, sex, religion, or disability is worse than wrong. It's an evil that strikes at the very heart of the American ideal." George H.W. Bush, President of the United States, Remarks on the Civil Rights Act of 1991 (Nov. 21, 1991).

Second, Congress understood and intended the Civil Rights Act of 1991 to respond to certain cases in the Court's Title VII jurisprudence and to expand "the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(4), 105 Stat. 1071, 1071 (1991). In particular, Congress was concerned about the effect *Price Waterhouse* would have on the scope of protections available to victims of discrimination under Title VII. *Price Waterhouse* "sen[t] a message that a little overt sexism or racism is okay, as long as it was not the only basis for the employer's action."

H.R. REP. NO. 102-40 (I), at 47 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 585. Congress perceived the Court's decision in *Price Waterhouse* to eliminate all liability if the employer proved the same decision defense as "severely undermin[ing]" the protections of Title VII, because it seemed to allow illegal discrimination to go unpunished, thus making it a hollow right for victims of employment discrimination. H.R. REP. NO. 102-40 (II), at 18, *reprinted in* 1991 U.S.C.C.A.N. 694, 711.

Congress understood that "[for Title VII to be] meaningful, victims of proven discrimination must be able to obtain relief, and perpetrators of discrimination must be held liable for their actions." H.R. REP. NO. 102-40 (I), at 47, *reprinted in* 1991 U.S.C.C.A.N. 549, 585. To address this point, Congress rejected *Price Waterhouse's* holding that proof of the same decision defense is a complete bar to liability, but explicitly codified *Price Waterhouse's* causation standard, thus "reaffirming that any reliance on prejudice in making employment decisions is illegal." H.R. REP. NO. 102-40 (II), at 2, *reprinted in* 1991 U.S.C.C.A.N. 694, 695. *See Smith v. Xerox Corp.*, 584 F. Supp. 2d 905, 909 (N.D. Tex. 2008), *aff'd*, 602 F.3d 320 (5th Cir. 2010). Congress did so by specifically adding the "motivating factor" language into Title VII.

Through the addition of this language, Congress acknowledged the reality of the modern workplace: employment decisions can be influenced by a host of legitimate and illegitimate factors. By codifying this "motivating factor" language, Congress required the complaining party to "demonstrate that

discrimination was a contributing factor [7] in the employment decision i.e., that discrimination actually contributed to the employer's decision with respect to the complaining party." H.R. REP. NO. 102-40 (II), at 18, *reprinted in* 1991 U.S.C.C.A.N. 694, 711. Congress did not, however, "make mere discriminatory thoughts actionable." *Id.*

Although the legislative history primarily discusses race and sex discrimination, there is nothing to suggest that Congress intended to create one standard of causation under Title VII's substantive provision and another, higher standard under Title VII's antiretaliation provision. Furthermore, there is nothing in the legislative history of the Civil Rights Act of 1964 or the 1991 amendments suggesting that Congress intended to have different standards for proving discrimination based on a protected classification and retaliation. Indeed, the declared purpose of the 1991 amendments was to protect employee rights and ensure that "any reliance on prejudice in making employment decisions is illegal." H.R. REP. NO. 102-40 (II), at 2, *reprinted in* 1991 U.S.C.C.A.N. 694, 695. No one can reasonably dispute that "prejudice" encompasses illegal retaliation against an employee who opposed discrimination. In fact, retaliation against an employee who engaged in protected activity is a form of intentional discrimination

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[7] The initial versions of the Civil Rights Act of 1991 used the term "contributing factor." In a late amendment, Congress substituted that term for "motivating factor," but the House report at the time of passage said that "[t]his change is cosmetic and will not materially change the courts' findings." 137 CONG. REC. 13537-38 (1991).

encompassed by Title VII. Faced with employment actions motivated by both legitimate and illegitimate factors, Congress intended any discrimination contributing to an employment decision to be illegal.

Recognizing that Title VII's antiretaliation provision protects and ensures Title VII's principal antidiscrimination rights, it is fair to conclude that Congress intended employees to be equally, if not more, protected against unlawful retaliation. *See supra* Section I. It is nonsensical to assume that Congress would design a more rigorous culpability standard for proving unlawful retaliation than for other forms of intentional discrimination. Consistent with the context and purpose of the 1991 amendments, this Court should adopt a uniform application of Title VII's substantive and antiretaliation provisions, thus providing clarity and predictability to the rights and remedies of employees and employers.

IV. The Court's Analysis In *Gross* Does Not Control Whether There Is A Motivating Factor Claim Under The Antiretaliation Provision of Title VII

The Court can find that "motivating factor" analysis applies to retaliation claims under Title VII without contradicting the analysis employed in *Gross* and without relying upon the *Price Waterhouse* analysis, which the majority in *Gross* found of limited utility. Because *Gross* involved an interpretation of a different statute and Congress did not add the "motivating factor" language to the ADEA, the Court held that it could not transport this language across statutes, and that the ADEA's "because of" language required an employee to prove "but-for" cause.

In fact, the Court in *Gross* explicitly warned against transferring rules among statutes without caution. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009) (citing *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008)) ("[W]e 'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.'"). Petitioner contends that this argument is a "red herring" and that the *Gross* standard controls in this instance since the Court "construed a materially identical statute." Pet. Br. at 24. However, the Court's reasoning in *Gross* is in direct conflict with Petitioner's proposition. In regard to the language at issue in this case, the Court in *Gross* ruled that Title VII is not identical to the ADEA. Rather, the Court found that previous Supreme Court precedent interpreting Title VII did not govern the interpretation of the ADEA because Congress failed to amend the ADEA in the same fashion as Title VII. *Gross*, 557 U.S. at 174. Unlike Title VII, the ADEA does not contain language regarding a "motivating factor" standard or the same decision defense.

In analyzing the ADEA, the Court noted that Congress properly holds the power to decide the standard of causation in a federal employment discrimination statute. The Court's role is to "give effect to Congress' choice." *Gross*, 557 U.S. at 177 n.3. Congress already made a choice regarding Title VII by adding the "motivating factor" language. As discussed *supra* in Section III, Congress was legislating broadly when it added this "motivating factor" language because it was considering Title VII as a whole.

In addition to the ADEA, Petitioner argues that *Gross*' "but-for" causation standard should apply to other federal anti-discrimination statutes that also prohibit actions "because of" or "on the basis of" an illegal motive. Pet. Br. at 28-29. In particular, Petitioner proposes that the Court should take note that the "solely because of" standard set forth in the Rehabilitation Act of 1973 "is at least as strict" as "but-for" cause, even though, as noted, no other federal antidiscrimination statute contains the word "solely." Pet. Br. at 29. Not only does Petitioner's argument wholly ignore the Court's reasoning in *Gross* that "but-for" or "because of" does not require "sole cause," but Petitioner also boldly invites this Court to apply the "solely" language from one particular subsection of the Rehabilitation Act (Section 504) to several statutes that specifically and purposefully do not contain it. Especially in the case of Title VII's antiretaliation provision, such an application would go directly against established precedent and legislative intent.

The overreaching nature of Petitioner's argument on this point is vividly demonstrated where Petitioner argues that *Gross*' "but-for" causation standard applies to the Americans with Disabilities Act (ADA), which prohibits discrimination "on the basis of disability." 42 U.S.C. §§ 12112(a), (b) (2006); Pet. Br. at 29. Yet Congress has rejected that very contention. Congress incorporated the "powers, remedies, and procedures set forth" in certain provisions from Title VII into Title I of the ADA. 42 U.S.C. § 12117(a). Among the Title VII provisions incorporated into the ADA is Section 2000e-5, which authorizes relief where a

plaintiff proves that race, color, religion, sex, or national origin was a "motivating factor" for an employment practice, even if other factors also motivated the practice. 42 U.S.C. §§ 2000e-5(g)(1), (g)(2)(B) (2006).

Petitioner suggests that the ADA's incorporation of Section 2000e-5's powers, remedies and procedures remains forever frozen in 1990, when the ADA was enacted, rather than reflecting subsequent amendments to Section 2000e-5. History tells otherwise. Indeed, Congress considered and rejected an amendment to the ADA that would have done precisely what Petitioner contends Congress did. During consideration of the ADA:

> An amendment was offered . . . that would have removed the cross-reference to title VII and would have substituted the actual words of the cross-referenced sections. This amendment was an attempt to freeze the current title VII remedies . . . in the ADA. This amendment was rejected as antithetical to the purpose of the ADA—to provide civil rights protections for persons with disabilities that are parallel to those available to minorities and women.

H.R. REP. NO. 101-485 (III), at 48 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 471.

In fact, at the time that this amendment was considered, H.R. 4000, later enacted as the Civil Rights Act of 1991, was pending before Congress and proposed, among other things, to amend Section 2000e-5 to permit motivating factor claims.

Congress understood that "[b]ecause of the cross-reference to Title VII in Section 107, *any amendments to title VII that may be made in H.R. 4000 or in any other bill would be fully applicable to the ADA.*" *Id.* (emphasis added). And Congress chose to keep it that way: "[b]y retaining the cross-reference to title VII, the Committee's intent is that the remedies of title VII, currently *and as amended in the future*, will be applicable to persons with disabilities." *Id.* (emphasis added).[8]

Given the Court's explicit warning in *Gross* against transporting rules from one statute to another statute, the Court should reject Petitioner and its supporting *Amici's* argument that *Gross* is applicable to Title VII, as well as all other similarly worded employment statutes.

V. Recognizing The Same Causation Standards Under Title VII's Substantive And Antiretaliation Provision Is A Commonsense And Functional Approach Which Eliminates Jury Confusion

The Seventh Circuit recently acknowledged that "vague judicial terminology, such as 'motivating factor' and 'proximate cause' . . . confuses judges, jurors, and lawyers alike; and [that] philosophical conundra such as 'causation' present unnecessary

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[8] *See also* H.R. REP. NO. 101-485 (III), at 48, *reprinted in* 1990 U.S.C.C.A.N. 445, 471 ("The Committee intends that the powers, remedies and procedures available to persons discriminated against based on disability shall be the same as, and parallel to, the powers, remedies and procedures available to persons discriminated against based on race, color, religion, sex or national origin. Thus, if the powers, remedies and procedures change in title VII . . . , they will change identically under the ADA for persons with disabilities.").

challenges to understanding." *Cook v. IPC Int'l Corp.*, 673 F.3d 625, 628 (7th Cir. 2012). Jury instructions reflecting these differing standards frequently cause confusion, and the likelihood of confusion correlates with the complexity of the instructions. Petitioner asks the Court to further confuse matters by applying one standard to Section 703 discrimination claims and another to Section 704 retaliation claims. Petitioner contends that applying multiple standards to all claims of intentional discrimination under a single statute somehow would be less confusing to jurors. This argument defies common sense.

While juries are generally thorough and thoughtful when properly instructed, numerous commentators and judges have expressed concern about jurors' ability to resolve complex civil litigation. *See generally* Joe S. Cecil, Valerie P. Hans & Elizabeth C. Wiggins, *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727, 733 (1991) (citing Chief Justice Warren Burger). Jury instructions involving multiple standards and difficult legal concepts only increase this complexity.

By accepting Petitioner's argument that jurors should employ two different causation standards in cases involving a claim of discrimination based upon the protected classification and a retaliation claim, the Court would require jurors with limited legal exposure to the law to resolve an issue with which many courts continue to struggle. There is no reason to further this confusion by setting separate causation standards for two forms of intentional discrimination under the same statute.

This is not simply an academic concern but also a very practical problem. According to the Equal Employment Opportunity Commission's (EEOC) fiscal year 2012 enforcement and litigation statistics, retaliation is the most frequently filed charge with the EEOC. Beginning in 2009 and continuing presently, the total number of retaliation charges surpassed race discrimination, becoming the most frequently alleged claim.[9] Cases in which there are multiple claims under Title VII, involving both a claim of discrimination based upon a protected classification and a retaliation claim, are common. This present case is such an example where the employee alleged both discrimination and retaliation under Title VII, as was *Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010), which the Fifth Circuit relied upon below when deciding "motivating factor" analysis applied to Title VII retaliation claims. Despite Petitioner and its supporting *Amici's* contention that retaliation claims are frivolous, retaliation is a very real problem suffered by many employees.

As discussed in Section II, the courts have applied "motivating factor" analysis for decades and its application has not led to a flood of cases or misuse by employees. However, Petitioner and its supporting *Amici* attempt to craft a policy argument that employees will try to game the system in order

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[9] The EEOC's final compilation of the fiscal 2012 enforcement and litigation statistics revealed that the EEOC received 37,836 private sector retaliation charges, in addition to 33,512 race discrimination charges, and 30,356 sex discrimination charges. CHARGE STATISTICS FY 1997-FY 2012, http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Apr. 8, 2013).

to obtain a "motivating factor" instruction for a jury.[10] As this case illustrates, and as the courts have noted, the intricacies of these causation standards can be confusing to judges and attorneys. It truly strains credulity to suggest that employees will intentionally engage in protected activity under Title VII merely to gain the advantage of a "motivating factor" instruction. While any person may file a discrimination charge with the EEOC based upon race, color, religion, sex, or national origin, retaliation requires opposing discrimination or participating in a protected activity. Further, a plaintiff must demonstrate that the challenged conduct would have "dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (internal citations omitted).

Requiring the same causation standards under Title VII's provisions prohibiting discrimination based upon a protected classification and the antiretaliation provision avoids the confusing inconsistencies that would result if a jury could be charged with "motivating factor" under one section of Title VII and "but-for" cause under another. The standard Petitioner wishes to impose on the antiretaliation provision should be rejected

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[10] *See, e.g.*, Br. of *Amicus Curiae* Nat'l School Bds. Ass'n at 7-8 ("[A]*ny* employee can engage *strategically* in protected activity in anticipation of an adverse employment decision. Consequently, the mixed-motive standard effectively opens the door to larger numbers of meritless administrative complaints and lawsuits alleging retaliation.").

because it is out-of-step with legislative intent, Supreme Court precedent, and public policy.

CONCLUSION

For the foregoing reasons, the Court should affirm the Fifth Circuit's decision that "motivating factor" analysis is available in Title VII retaliation claims.

Respectfully submitted on April 10, 2013.

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APPENDIX A

INDIVIDUAL STATEMENTS OF INTEREST OF *AMICI CURIAE*

The **National Employment Lawyers Association** (NELA) advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. Founded in 1985, NELA is the country's largest professional organization comprised exclusively of lawyers who represent individual employees in cases involving labor, employment, and civil rights disputes. NELA and its 68 circuit, state, and local Affiliates have more than 3,000 members nationwide committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the workplace rights of individuals.

The **Leadership Conference on Civil and Human Rights** is the nation's oldest and largest civil and human rights coalition, consisting of more than 210 national organizations charged with promoting and protecting the rights of all persons in the United States. The Leadership Conference was founded in 1950 by A. Philip Randolph, head of the Brotherhood of Sleeping Car Porters; Roy Wilkins of the NAACP; and Arnold Aronson, a leader of the National Jewish

Community Relations Advisory Council. The Leadership Conference works to build an America that is inclusive and as good as its ideals and towards this end, urges the court to find that the "motivating factor" standard of Title VII is the appropriate causation standard to apply in both Title VII discrimination and retaliation claims. The Leadership Conference believes that holding workplace retaliation claims brought under Title VII to a different, higher standard than workplace discrimination claims contravenes the intended goals of the statute and fails to protect all workers from discrimination.

9to5 is a national membership-based organization of women in low-wage jobs working to end discrimination and achieve economic justice. 9to5's members and constituents are directly affected by sex and other forms of workplace discrimination, sexual and other forms of harassment, and retaliation, as well as the difficulties of seeking and achieving redress for all these issues. 9to5 has worked for four decades at the federal level and in the states to strengthen protections against workplace discrimination and harassment. The issues of this case are directly related to 9to5's work to protect women's rights in the workplace and end workplace discrimination. The outcome of this case will directly affect our members' and constituents' rights in the workplace and their ability to achieve redress for workplace discrimination, harassment and retaliation.

AARP is a nonpartisan, nonprofit organization with a membership. AARP strives to enable people age 50+ to secure independence, choice and control

in ways beneficial and affordable to them and to society as a whole. In a variety of ways, including legal advocacy as an *amicus curiae*, AARP supports the rights of all Americans, and in particular older workers, to workplaces free of discrimination. To this end, AARP has been vigilant in advocating for vigorous and full enforcement of federal civil rights laws including the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Rehabilitation Act, and Title VII of the Civil Rights Act of 1964.

The **American Association for Justice** (AAJ) is a voluntary national bar association whose trial lawyer members primarily represent plaintiffs in personal injury actions, employment discrimination cases, and civil rights suits. AAJ believes that legal redress should be freely available under federal anti-discrimination statutes, not only to achieve equality in the workplace but also to allow America to benefit fully from its qualified workers. The **Anti-Defamation League** (ADL) was founded in 1913 to combat anti-Semitism and other forms of discrimination, to advance goodwill and mutual understanding among Americans of all creeds and race, and to secure justice and fair treatment to all. Today, ADL is one of the world's leading civil and human rights organizations combating anti-Semitism and all types of prejudice, discriminatory treatment and hate. As part of its commitment to protecting the civil rights of all persons, ADL has supported the passage of federal and state antidiscrimination laws. Recognizing the importance of being able to effectively enforce these laws, ADL has also filed *amicus* briefs in cases such

as this one, which raise important constitutional and legal issues regarding how such laws are interpreted.

The **Asian American Justice Center** (AAJC), a member of the Asian American Center for Advancing Justice, is a national nonprofit, nonpartisan organization whose mission is to advance the civil and human rights of Asian Americans and promote a fair and equitable society for all. Founded in 1991 and based in Washington, D.C., AAJC engages in litigation, public policy advocacy, and community education and outreach on a range of civil rights issues, including fairness and non-discrimination in the workplace. Individuals from minority, immigrant, and other underserved communities such as those for whom AAJC advocates are particularly vulnerable to unfair employment practices. AAJC's interest in the effective vindication of these employees' rights has resulted in the organization's participation in numerous *amicus curiae* briefs supporting vigorous enforcement of Title VII and other employment laws.

The **Asian Law Caucus** (ALC) was founded in 1972 as the nation's first Asian American legal organization dedicated to defending the civil rights of Asian Americans and Pacific Islander communities. A member of the Asian American Center for Advancing Justice, ALC has a long history of protecting low-wage immigrant workers through direct legal services, impact litigation, community education, and policy work. ALC's regular caseload includes employment discrimination and retaliation cases on behalf of Asian and other immigrant workers

The **Asian Pacific American Legal Center** of Southern California (APALC), a member of the Asian American Center for Advancing Justice, is the nation's largest nonprofit public interest law firm devoted to the Asian American, Native Hawaiian and Pacific Islander community. APALC provides direct legal services to indigent members of our community and uses impact litigation, policy advocacy, community education and leadership development to obtain, safeguard and improve the civil rights of Asian Americans, Native Hawaiians and Pacific Islanders. As part of its civil rights work, APALC has served hundreds of workers and aided them in bringing claims for unpaid wages and employment discrimination.

The **Bazelon Center For Mental Health Law** is a national nonprofit organization that advocates for the rights of individuals with mental disabilities. The Center, founded in 1972 as the Mental Health Law Project, engages in litigation, policy advocacy, and public education to promote equal opportunities for individuals with mental disabilities in all aspects of life, including employment, education, housing, health care, family and community living. Enforcement of the Americans with Disabilities Act (ADA) is central to the Center's efforts to remedy disability-based discrimination.

The **Equal Justice Center** (EJC) is a nonprofit employment law firm with offices in Austin, San Antonio, and Dallas, Texas. The EJC provides legal representation and counsel to low-wage construction laborers, janitors, dishwashers, housekeepers, and similar low-paid working people on discrimination, wage-hour, and other employment-related matters

throughout Texas and across the United States. EJC has a vital interest in preserving civil rights in the workplace by preventing the erosion of Title VII's fundamental protections against employment discrimination.

Equal Rights Advocates (ERA) is a national nonprofit civil rights advocacy organization based in San Francisco that is dedicated to protecting and expanding economic justice and equal opportunities for women and girls. ERA recognizes that women historically have been the targets of legally sanctioned discrimination and unequal treatment in the workplace, and that this unfair treatment often is reinforced and/or perpetuated by retaliation against those who speak out against it. Based on its nearly four decades of experience litigating employment discrimination cases and hearing from thousands of women workers each year, ERA believes that applying one standard of causation to claims of discrimination based on an employee's membership in a protected class (including her sex), and a different standard to claims of discrimination based on the same employee's exercise of protected rights would frustrate the central purpose of our anti-discrimination laws and leave more women vulnerable to the unfair practices and policies they were designed to eliminate.

Friends of Farmworkers (FOF) is a nonprofit legal services organization based in Philadelphia, Pennsylvania. Since 1975, FOF has worked to improve the living and working conditions of migrant farmworkers and other vulnerable, low wage, and immigrant workers in Pennsylvania. FOF provides free legal services to individuals on employment-

related matters; engages in community education; and, advocates on local, state, and national levels on issues of concern to FOF's client population. The outcome of this matter will have a direct impact on FOF's client population. FOF frequently represents workers who face unlawful discrimination and retaliation in the workplace due to the worker's sex, race, or national origin. In order for the antidiscrimination provisions of Title VII to effectively protect workers, including the especially vulnerable workers FOF represents, the anti-retaliation provision of Title VII must be broadly interpreted, as intended by Congress.

Gender Justice is a nonprofit advocacy organization based in the Midwest that is committed to the eradication of gender barriers through impact litigation, policy advocacy, and education. As part of its impact litigation program, Gender Justice represents individual citizens and provides legal advocacy as *amicus curiae* in cases involving the proper interpretation of the Civil Rights Act of 1964 and other federal or state-level civil rights laws. Gender Justice has an interest in preserving employees' right to bring workplace discrimination claims, free from retaliation.

The **Legal Aid Society – Employment Law Center** (LAS-ELC) is a nonprofit public interest law firm whose mission is to protect, preserve, and advance the workplace rights of individuals from traditionally under-represented communities. Since 1970, the LAS-ELC has represented plaintiffs in cases involving the rights of employees in the workplace, particularly those cases of special import to communities of color, women, recent immigrants,

individuals with disabilities, LGBT individuals, and the working poor. The LAS-ELC's interest in preserving the protections afforded employees by federal antidiscrimination laws is longstanding. The LAS-ELC has successfully litigated several cases against major metropolitan fire departments to provide increased opportunity for people of color and appeared before this Court on numerous occasions as counsel for plaintiffs as well as in an *amicus curiae* capacity.

The **National Employment Law Project** (NELP) is a nonprofit legal organization with over 40 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of employment laws. NELP has litigated and participated as *amicus* in hundreds of cases addressing the rights of low-wage workers under federal and state labor and employment laws, and knows firsthand the barriers faced by workers seeking to enforce their rights, and the importance of strong anti-retaliation protections for those workers brave enough to stand up for or inquire about their workplace rights.

The **National Partnership for Women & Families** is a nonprofit, national advocacy organization founded in 1971 that promotes equal opportunity for women, quality health care, and policies that help women and men meet the demands of both work and family responsibilities. The National Partnership has devoted significant resources to combating sex, race, age, and other forms of invidious workplace discrimination and has

filed numerous *amicus curiae* briefs in the U.S. Supreme Court and in the federal circuit courts of appeals to advance the opportunities of protected individuals in employment.

The **National Women's Law Center** (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity and protection for women in the workplace. This includes not only the right to a workplace that is free from all forms of discrimination, but also access to effective means of enforcing that right and remedying such conduct. NWLC has prepared or participated in numerous *amicus* briefs filed with the Supreme Court in employment cases.

The **North Carolina Justice Center** (NCJC) is a nonprofit legal advocacy organization that seeks to secure economic justice for disadvantaged persons and communities throughout North Carolina. The NCJC regularly represents low-wage workers whose rights have been violated by their employers through discriminatory treatment, underpayment or nonpayment of wages and retaliation. The NCJC has a focus on the employment rights of migrant and seasonal workers, a particularly vulnerable group of workers whose ability to demand their employment rights be respected is directly affected by the issue before this Court.

The **Public Justice Center** (PJC) is a nonprofit civil rights and anti-poverty legal services organization. PJC's Appellate Advocacy Project seeks to expand and improve the representation of

indigent and disadvantaged persons and their interests before state and federal appellate courts. PJC has submitted numerous *amicus* briefs defending workers' civil rights under federal, state and local anti-discrimination laws. PJC has an interest in the present case because a reasonable and workable standard for proving retaliation for opposing discrimination in employment is a vital component of access to justice for American workers.

AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER,

Petitioner,

v.

NAIEL NASSAR, M.D.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICUS CURIAE BRIEF OF THE NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National School Boards Association ("NSBA") is a not-for-profit organization of state school board associations from throughout the United States and the Board of Education of the U.S. Virgin Islands. Through its member state associations NSBA represents over 90,000 school board members who govern some 13,800 local school districts employing almost 6.4 million people, collectively the largest employer in the nation.[1]

NSBA's mission is to foster excellence and equity in public education through school board leadership. As part of its mission, NSBA supports the reasonable application of anti-discrimination laws that balances the rights of public school employees with the educational and fiscal challenges facing public schools. In this case, NSBA seeks to provide the Court with concrete examples of employment decisions faced by public school districts in which a rule that places the burden of proof on employers in retaliation cases (the so-called "mixed-motive" analysis) under Title VII of the Civil Rights Act of 1964 and similarly-worded anti-discrimination statutes would hamper school districts' ability to accomplish their education mission.

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[1] Pursuant to Supreme Court Rule 37.6, no part of this brief was authored by counsel for any party, and no person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. This brief is filed with the written consent of all parties pursuant to rule 37.3(a); the requisite consent letters have been filed with the Clerk of this Court.

SUMMARY OF THE ARGUMENT

The decision in this case will have unique effects on our nation's public schools, which employ more than six million workers. Adopting a mixed-motive analysis for retaliation claims under Title VII of the Civil Rights Act of 1964 and similarly-worded anti-discrimination statutes would have especially harmful effects on schools. Schools face a plethora of state and federal mandates designed to ensure that the right teachers are teaching the right students. This requirement often necessitates changes in the terms or conditions of employment arrangements, including transfers of employees, all of which carry the potential for litigation. This situation is aggravated by budget cuts, which have required nearly all schools across the country to reduce staff. The sheer volume of employment actions schools must take means that they are frequently enmeshed in litigation.

Additionally, federal and state laws require schools to use elaborate and time-consuming procedures to take adverse employment actions, including terminations. These time-consuming procedures create opportunities in which employees may engage in protected activities, such as filing internal complaints or administrative claims addressing their own employment or even objecting to the manner in which a school is treating a student with a disability, for example. In addition, public school employers are subject to a multitude of anti-discrimination statutes that impose affirmative obligations on school employees to take an active role in identifying and addressing unlawful discrimination and harassment against students.

When an employee engages in one of these protected activities near the time of a school's adverse employment action against that employee, the employee can require the school to defend its employment decision in legal proceedings, even if that decision had nothing to do with the protected activity.

Adopting a mixed-motive standard in retaliation cases would harm school districts whose statutory obligations require them regularly to take adverse employment actions and create continual opportunities for employees to engage in protected activity. The ease of alleging mixed motives opens the door to larger numbers of meritless administrative complaints and lawsuits. Moreover, under the mixed-motive approach, summary judgment is more difficult for employers to obtain because a judge must determine whether a reasonable jury could conclude that retaliation was one of several factors giving rise to the adverse employment action. The mixed-motive test therefore raises the likelihood that claims will have to be settled or pursued through trial based solely on the expense and risk that such claims pose.

Allowing plaintiffs in retaliation cases to prevail without having to prove that an unlawful motive caused the challenged employment action will render schools more vulnerable to unfounded retaliation claims and, therefore, inhibit school districts from making necessary staffing changes. Accordingly, shifting to a mixed-motive analysis in these cases will force school districts to choose between taking actions that promote their educational goals and actions that avoid meritless employment litigation. Such a shift will hinder

schools from making non-retaliatory decisions that are in the best interests of public school children.

To prevent this outcome, this Court should reverse the court of appeals' judgment and hold that to prevail in a retaliation case, a plaintiff must prove that a retaliatory motive was the but-for cause of an adverse employment decision. This rule best honors the statutory text, conventional rules of litigation, and the interest in preserving employer autonomy to make non-retaliatory management decisions. A ruling in favor of the Respondents would impose on public schools a heavy burden to make litigation-motivated employment decisions to the detriment of our children's education.

ARGUMENT

I. Incorporating a mixed-motive standard in Title VII retaliation cases would unduly burden public schools.

This case asks whether federal employment discrimination laws (in this case, the anti-retaliation provisions of Title VII of the Civil Rights Act of 1964 ("Title VII")) require proof that an employer would not have taken an adverse action "but for" an improper motive ("but-for" causation) or instead allow a plaintiff to show that the improper motive was an additional reason for the adverse employment action ("mixed-motive" causation).

A. Adopting the mixed-motive standard presents special problems for schools.

K-12 public schools, collectively the largest employer in the United States, would be particularly disadvantaged by an expansion of the mixed-motive standard.[2] Statutory, contractual, and district policy require schools to follow lengthy procedures for making and implementing employment decisions. These procedures notify employees of forthcoming adverse employment decisions well before those decisions are made, creating abundant opportunities for claims later determined to be meritless, but often only after lengthy and expensive proceedings.

Limits on available funding to defend litigation may force schools to forego staffing changes to reduce exposure to liability, potentially harming students. At the same time, schools' public missions and statutory duties that require them—often under threat of draconian penalties—to meet objective performance criteria require flexibility in

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[2] K-12 public schools employ roughly six million people. Patrick Keaton, *Public Elementary and Secondary School Student Enrollment and Staff Counts From the Common Core of Data: School Year 2010–11*, National Center for Education Statistics (April 2012), http://nces.ed.gov/pubs2012/2012327.pdf. The federal government employs 4.4 million people in civilian and military capacities. U.S. OFFICE OF PERS. MGMT., FED. EMP'T REPORTS, *available at* https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/historical-tables/total-government-employment-since-1962/. State governments employ 3.8 million people. U.S. BUREAU OF CENSUS, 2011 PUB. EMP. & PAYROLL DATA, *available at* http://www2.census.gov/govs/apes/11stus.txt.

school staffing. These opposing constraints threaten to place schools in an impossible position. As the remainder of this brief will show, the expansion of the mixed-motive analysis to retaliation and discrimination statutes lacking any "motivating factor" language would impose an unworkable standard upon public school employers.

NSBA supports the Petitioner because a mixed-motive causation standard would weaken the statutory requirement that an adverse employment action be taken "because" or "on the basis of" an unlawful, discriminatory motive, making employment litigation more expensive and time-consuming and diverting resources away from schools' educational mission. NSBA adopts Petitioner's analysis of the language in 42 U.S.C. § 2000e-3(a) (2013),[3] 42 U.S.C. § 12112(a) (2013),[4] and 29 U.S.C. § 623(a) (2013);[5] its argument that this Court's analysis in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 176 (2009), applies equally in this case; and its argument that the 1991 amendments to 42 U.S.C. § 2000e-2(m), with no similar amendment to § 2000e-3(a), exhibit legislative intent to retain a

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[3] Under the anti-retaliation provisions of Title VII, it is unlawful to discriminate against an employee "*because* he has opposed any practice made an unlawful employment practice by this subchapter." (emphasis added).

[4] Under the Americans with Disabilities Act ("ADA"), an employer may not "discriminate against a qualified individual *on the basis of* disability" (emphasis added).

[5] Under the Age Discrimination in Employment Act ("ADEA"), it is unlawful to take certain actions against an employee "*because* of such individual's age" (emphasis added).

but-for standard in the anti-retaliation portion of Title VII (as well as the ADA and the ADEA).

If Respondent were to prevail, the extension of the mixed-motive analysis would make employment litigation significantly more burdensome for all employers, especially under the anti-retaliation provisions of Title VII and the ADA. As compared with but-for causation, the mixed-motive standard expands employer liability by punishing even employment decisions that would have been made without any prohibited motive. In other words, the standard severs the causal connection between the prohibited motive and the conduct that inflicts the harm.

In retaliation cases, severing this connection would not just expand liability but would facilitate the strategic use of protected activity, which is an especially significant problem for schools. Whereas the mixed-motive discrimination provisions of Title VII create bounded classes, *any* employee who engages in a wide range of protected activities can assert a retaliation claim under Title VII or the ADA.[6] *See Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 579–80 (6th Cir. 2000). Additionally, *any*

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[6] "The anti-discrimination statutes do not limit or condition in any way the protection against retaliation for participating in the charge process." U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL, EEOM 614:5. Indeed, this Court recently found that an employee who was terminated after his fiancee, who formerly worked for the same employer, filed a sex discrimination complaint against the employer, had a valid Title VII retaliation claim, as the plaintiff was in the zone of interest sought to be protected by the statute. *Thompson v. North American Stainless, LP*, 131 S. Ct. 863 (2011).

employee can engage *strategically* in protected activity in anticipation of an adverse employment decision. Consequently, the mixed-motive standard effectively opens the door to larger numbers of meritless administrative complaints and lawsuits alleging retaliation. Perhaps more important, a mixed-motive standard would make summary judgment in these cases far more difficult for defendants to obtain, subjecting employers to the expense and time of trials. Moreover, it would significantly alter the costs of litigation and settlement, thereby improperly affecting employers' decisions about whom to discipline, transfer, or terminate.

B. This Court already has broadened the kinds of employment actions qualifying as adverse; adding the mixed-motive standard of causation would force schools to choose between good staffing decisions and avoiding meritless litigation.

Schools would be uniquely impacted if this Court were to allow mixed-motive causation, a change that would come atop the reduced burden on plaintiffs in another aspect of the retaliation *prima facie* case requirements. In *Burlington Northern and Santa Fe Railroad Co. v. White*, this Court held that adverse employment actions covered by the anti-retaliation provision of Title VII are not limited to "so-called 'ultimate employment decisions,'" and can instead encompass other actions (such as a transfer) if an employee reasonably deems them

adverse. 548 U.S. 53, 67-68 (2006). Other courts have recognized that *Burlington Northern* "broadened the scope of Title VII's anti-retaliation protection." *Hicks v. Baines*, 593 F.3d 159, 163-64 (2d Cir. 2010); *see also Caldwell v. Johnson*, 289 Fed. App'x. 579, 588 (4th Cir. 2008) (stating that in *Burlington Northern*, "the Court noted meaningful differences in the anti-discrimination and anti-retaliation statutes that provided recovery for a far broader range of retaliatory conduct unrelated to employment.").

Advocates of the mixed-motive analysis for Title VII retaliation claims now seek to have a lesser burden on another prong of the *prima facie* case: causation. The Petitioner has explained how mixed-motives are easy to allege, hard to disprove, and hard to dispose of on pretrial motions because the standard forces an employer to prove as an affirmative defense that it would have taken the same action absent the protected activity. If the Court allows a mixed-motive analysis for Title VII retaliation claims, plaintiffs will face a reduced burden in demonstrating two of the three elements of a retaliation claim. This change could make the *prima facie* case, which already is a minimal showing, nothing more than a recitation of the elements. *See Nguyen v. City of Cleveland*, 229 F.3d 559, 565 (6th Cir. 2000) ("The burden of establishing a *prima facie* case in a retaliation action is not onerous, but one easily met."). While anti-retaliation provisions are necessary to guarantee the rights of those who oppose discrimination in the workplace, tipping the balance so heavily in favor of plaintiffs does not serve this worthwhile goal.

Schools are particularly vulnerable to a more expansive definition of adverse employment action for Title VII retaliation claims because frequent teacher reassignments and transfers are necessary to meet the needs of a constantly-changing student population; and multiple courts have recognized that even teacher reassignment could constitute a retaliatory adverse employment action. *See, e.g., Ragusa v. Malverne Union Free Sch. Dist.*, 381 Fed. App'x 85, 90 (2d Cir. 2010) (reasonable jury could conclude that "the added challenge of a sixth-grade assignment" is adverse employment action); *Howard v. Bd. of Educ. of Memphis City Sch.*, 70 Fed. App'x 272, 284, n.9 (6th Cir. 2003) (jury might have reasonably found that successive transfers constitute adverse employment action); *Lindner v. New York City Bd. of Educ.*, No. 01-CV-8245, 2005 WL 1801648, at *3 (E.D.N.Y. July 28, 2005) (transfer from the "gifted program to classes of 'lower functioning' students" held to be adverse employment action to support retaliation claim). *Cf. Lucero v. Nettle Creek Sch. Corp.*, 566 F.3d 720, 729 (7th Cir. 2009) (reassignment from 12th grade English to 7th grade English was not adverse action because it did not consist of objectively less desirable duties). When combined with schools' already-existing vulnerability to retaliation claims, the additional burden of disproving a mixed-motive causation theory could cause schools to refrain from making needed staffing decisions to avoid them.

II. Shifting to a mixed-motive standard will undermine public schools' ability to serve students effectively in light of school districts' unique vulnerabilities to retaliation claims.

Public schools face unique vulnerabilities with respect to retaliation claims. As public entities, schools are required to provide employees with extensive procedural protections prior to taking an adverse employment action. These procedures, which derive from constitutional, statutory, or contractual rights, often involve multiple tiers of review, creating lengthy delays before an employment action is final. In addition, federal and state initiatives designed to improve teacher effectiveness have prompted legislation mandating notice of underperformance and long periods of remediation. These long delays prior to an adverse action—whether due to a statutorily imposed remediation period or to pre-deprivation procedural protections—create significant periods in which employees may engage in protected activity. Further, to fulfill their obligations under federal anti-discrimination statutes, public schools require employees to report suspected discrimination and harassment against students, thereby eliciting protected activity by employees. Schools, in short, operate under unique constraints that create an atmosphere ripe for protected activity. Allowing plaintiffs in retaliation cases to prevail without having to prove that an unlawful motive caused the challenged employment action will render schools more vulnerable to unfounded retaliation claims. Moreover, it will hinder schools from making non-

retaliatory decisions that may be in the best interests of public school children.

A. Schools are subject to employment-related constitutional, statutory, and contractual policy requirements that require staffing decisions to be implemented over a long period of time, creating opportunities for protected activity.

Public schools must abide by personnel laws enacted by state legislatures. These laws impose substantial delays between the time a school determines an adverse personnel action is warranted (typically shortly after the basis for the action is discovered) and the time a school is allowed to take the action. Consequently, these laws create opportunities for employees to engage in protected activities before final action is taken. *See generally Sias v. City Demonstration Agency*, 588 F.2d 692, 694-95 (9th Cir. 1978) (noting that filing an internal complaint charging discrimination or harassment gains protection under the participation clause of Title VII's retaliation proscription); *Wyatt v. Boston*, 35 F.3d 13, 15 (1st Cir. 1994) (same); U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL, EEOM 614:5 (same). In some cases, the timing of such protected activities (whether engaged in for genuine or tactical reasons) in relation to the adverse actions may create a presumption of causation. *See, e.g., Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (per curiam) (noting that some courts "accept mere temporal

proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a *prima facie* case."). The ease of alleging and difficulty of disproving unlawful retaliation under a mixed-motive standard will expose school employers to greater numbers of meritless claims of retaliation brought by employees who either mistakenly perceive adverse action to be related to protected activity or who engage in protected activity for strategic purposes. *Spadola v. New York City Transit Auth.*, 242 F. Supp. 2d 284, 292 (S.D.N.Y. 2003) (stating that the use of protected activity as "a tactical coercive weapon that may be turned against the employer as a means . . . to escape appropriate disciplinary measures" would thwart the purposes of Title VII).

1. Notice requirements mandated by due process provide opportunities for protected activity.

Because the vast majority of public school teachers are terminable only for cause once they have tenure status, *see, e.g.*, IND. CODE § 20-28-7.5-1(e) (2013); OHIO REV. CODE § 3319.16 (2013); CAL. EDUC. CODE § 44932 (2013), schools are constitutionally required to notify them of the charges, summarize the schools' evidence, and give the employee a chance to tell his or her story before taking disciplinary or other employment action. *Loudermill v. Cleveland Bd. of Educ.*, 470 U.S. 532, 545-546 (1985). These pre-deprivation processes

have been expanded through collective bargaining.[7] When notice of a pre-deprivation meeting is given, by definition no decision has yet been made on any adverse employment action, so a teacher engaging in protected activity during the time period between notice and final action sets the stage for a retaliation claim.

2. Statutory requirements relating to disciplinary procedures and remediation requirements offer additional opportunities for protected activity.

States have established their own time-consuming procedures that schools must follow before terminating teachers' employment. In many states, the process to terminate a school employee's employment may take several months and may involve a multi-tiered, elaborate review process, giving rise to additional chances for employees to engage in protected conduct. *See, e.g.*, IND. CODE § 20-28-7.5 (2013); OHIO REV. CODE § 3319.16 (2013) (establishing process that may take between 40 days

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[7] *See, e.g.*, Agreement Between Wichita Pub. Schs. Bd. of Educ. Unified Sch. Dist. No. 259 and United Teachers of Wichita (August 1, 2012 –July 31, 2013), at 27-28, *available at* www.nctq.org/docs/Wichita_TEA_FINAL_2012-09-06.pdf (allowing between four hours' and five days' notice before a teacher's pre-deprivation meeting); Negotiated Agreement Between Albuquerque Mun. Sch. Dist. No. 12 and Albuquerque Teachers Fed'n (2011 – 2012), at 62, *available at* www.nctq.org/docs/Albuquerque_AGREEMENT2011-2012finalforprintingAug31.pdf; Negotiated Agreement Between Clark Cnty. Sch. Dist. and Clark Cnty. Educ. Ass'n (2010 – 2011), at 54-55, *available at* www.nctq.org/docs/Clark_County_10_11_CCEA_Agreement.pdf

and several months). In California, for example, schools are required to give teachers written notice of a charge that could result in suspension or termination. CAL. EDUC. CODE § 44934 (2013).[8] Depending on whether the teacher's problems lie with performance or misconduct, the school cannot make any charge against that teacher for 90 or 45 days, respectively. CAL. EDUC. CODE § 44938(a)-(b)(1) (2013).[9] If a charge is brought after that initial period, the teacher has 30 days to request an evidentiary hearing, and that hearing must be held within 60 days of the request. CAL. EDUC. CODE §§ 44939, 44944(a)(1) (2013). The decision must then be made within 30 days of the hearing. CAL. GOV'T CODE § 11517 (2013). In all, this process can take between six months and one year, presuming that the parties do not seek any continuances. California is not alone in prescribing such procedures. States commonly require that schools move slowly after warning teachers that an adverse employment action may occur. These delays give school employees opportunities to participate in protected activities, thereby exposing schools to meritless retaliation claims that under a mixed-motive standard would be difficult for schools to dispose of through summary judgment.

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[8] This notice must contain documented "specific instances" of the behavior warranting the adverse action "so as to furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge." CAL. EDUC. CODE § 44938(a)-(b) (2013).

[9] No such charges can be filed between May 15th and September 15th. CAL. EDUC. CODE § 44948.5(e) (2013).

In addition, initiatives designed to improve teacher and administrator effectiveness have led to legislatively-mandated periods of remediation. In 2009, Congress provided $4.35 billion for the "Race to the Top Fund," a grant program designed to encourage innovation and improvements in student outcomes, with a focus on "recruiting, developing, rewarding and retaining effective teachers and principals..." .[10] Since that time, 36 states and the District of Columbia have introduced new teacher evaluation policies.[11] Some of these programs have included statutorily-required periods of remediation, further lengthening the time before an adverse employment action may be taken. *See, e.g.*, IND. CODE § 20-28-11.5-4(c)(4) (2013) (giving teachers whose performance warrants a low rating up to 90 days to complete a remediation plan to "correct the deficiencies"); 105 ILL. COMP. STAT. 5/24A-5(e) (2013) (prohibiting teachers whose performance is unsatisfactory from being discharged until provided remediation for 90 days); OKLA. STAT. tit. 70, §§ 6-101.16(B)(1)-(3); 6-101.24(A) (2013) (prohibiting discharge of a poor performing teacher until the teacher has been "admonished" in writing and given "reasonable time for improvement" that is two

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[10] U.S. DEP'T OF EDUC., RACE TO THE TOP FUND EXECUTIVE SUMMARY 2 (November 2009), *available at* http://www2.ed.gov/programs/racetothetop/executive-summary.pdf.

[11] Motoko Rich, *Seeking Aid, School Districts Change Teacher Evaluations*, N.Y. TIMES, Oct. 16, 2012, at A19, *available at* http://www.nytimes.com/2012/10/16/education/seeking-aid-more-districts-change-teacher-evaluations.html?pagewanted=1&_r=1&ref=educationdepartment.

months or less). During this remediation period, a teacher may engage in protected activity, exposing the school to a retaliation claim despite the lack of any connection between the adverse employment decision and protected activity.

B. Schools are additionally encumbered by mandatory anti-discrimination and anti-harassment policies that facilitate protected activity.

In addition to the vulnerability created by the lengthy period between when a teacher learns of a possible adverse action and when that action is taken, schools face further susceptibility to retaliation claims because of the rigorous anti-discrimination and anti-harassment policies they must put in place. Many laws recognize schools' responsibility to protect students' welfare and to maintain safe and non-discriminatory learning environments; many require schools to adopt and enforce rigorous requirements that staff members report suspected discrimination and harassment. While schools recognize the importance of these reporting requirements and encourage staff to take these obligations seriously, the very act of reporting can create protected activity that allows employees to challenge later employment actions wholly unrelated to their reports.

1. Section 504 of the Rehabilitation Act of 1973, which contains similar retaliation provisions to Title VII, provides a means for school employees to engage in protected activity based on advocacy for students with disabilities.

Schools' duties under Section 504 of the Rehabilitation Act of 1973 ("Section 504" and "Rehabilitation Act"), which prohibits disability discrimination, also may give rise to protected activity. 29 U.S.C. § 794 (2013) ("No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination . . . ."). The Section 504 implementing regulations require schools to "provide a free appropriate public education to each qualified handicapped person who is in the [school's] jurisdiction," 34 C.F.R. § 104.33(a) (2013), including "reasonably accommodat[ing] the needs of the handicapped child so as to ensure meaningful participation in educational activities and meaningful access to educational benefits." *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 280 (3d Cir. 2012).

When school team members disagree about whether a student qualifies for accommodations, what accommodations are "reasonable," or the most appropriate methods for accommodating a student, a teacher may advocate for accommodations different than the school suggests. When a school employee's advocacy for a student involves reporting alleged

acts or omissions that she reasonably and in good faith believes violate Section 504—for example, that the school has provided "insufficient" support to a harassed student—she engages in protected activity under Section 504. *Houlihan v. Sussex Technical Sch. Dist.*, 461 F. Supp. 2d 252, 258 (D. Del. 2006). *See also Barker v. Riverside Cnty. Office of Educ.*, 584 F.3d 821 (9th Cir. 2009) (finding that special education teacher has standing to sue for retaliation for filing a complaint with the Office for Civil Rights alleging school's failure to provide appropriate education to students under Section 504 and Title II of the ADA).[12]

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[12] Of course, advocating for students with disabilities would not be protected activity under Title VII, the statute at issue here. However, the Court's interpretation of Title VII's anti-retaliation provisions will impact the anti-retaliation provisions of Section 504 and Title IX of the Education Amendments of 1972 because they include similar language. Here, the Court must interpret Title VII's language that prohibits employers from taking an adverse employment action "*because* he has opposed any practice made an unlawful employment practice" or "*because* he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing." 42 U.S.C. § 2000e-3 (2013) (emphasis added). Similarly, the Rehabilitation Act was amended in 1978 to include the remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964. Title VI's anti-retaliation regulation states: "No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Section 601 of [the Civil Rights] Act or this part, or *because* he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part." 34 C.F.R. § 100.7(e) (2013) (emphasis added). Interpretation of the causation required by the use of "because" in all retaliation statutes, including the

2. Title IX of the Education Amendments of 1972, which also contains similar anti-retaliation provisions to Title VII, imposes rigorous reporting and monitoring obligations that invite protected activity.

Like Section 504, Title IX of the Education Amendments of 1972 ("Title IX") invites school employees to engage in protected activity by imposing rigorous reporting and monitoring requirements. Title IX prohibits sex discrimination and harassment by recipients of federal education funding. 20 U.S.C. § 1681(a) (2013) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."). In April 2011, the U.S. Department of Education's Office for Civil Rights, which is responsible for enforcing Title IX, issued a letter directing school districts to implement training for all school employees on identifying, reporting, and remedying harassment.[13]

Rehabilitation Act, will likely be influenced by the Court's decision in the instant case.

[13] Letter from Russlynn Ali, Assistant Sec'y of the U.S. Dep't of Educ. Office for Civil Rights, at 4 (Apr. 4, 2011), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.; *see also* U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 13-21 (Jan. 2001) (hereinafter "2001 Guidance").

This Court has also recognized the important role educators play in identifying and reporting sex discrimination and harassment: "teachers and coaches ... are often in the best position to vindicate the rights of their students because they are able to identify and bring it to the attention of administrators." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 181 (2005); *see also Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 649-50 (1999). "Indeed, sometimes adult employees are the only effective adversar[ies] of discrimination in schools." *Jackson*, 544 U.S. at 181 (quotations omitted). By encouraging and often requiring school employees to report suspected sex discrimination and harassment of students (including student peer harassment), school districts invite school employees to engage in activities that are protected under Title IX and that may form the basis of a retaliation claim. *See, e.g., id.* at 181 (quotations omitted) (recognizing Title IX retaliation claim brought by coach who complained of sex discrimination).[14]

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[14] Like Section 504, an employee's report of suspected sex discrimination or harassment in violation of Title IX is often not protected activity under Title VII (although it may be if the employee reported sex discrimination or harassment impacting employees). Nevertheless, courts regularly rely on Title VII precedent when interpreting Title IX. *See, e.g., Bowers v. Bd. of Regents of Univ. Sys. of Georgia*, No. 12-12244, 2013 WL 563180, at *3 (11th Cir. 2013) ("We apply Title VII case law to assess Bowers's Title IX claim."); *Milligan v. Bd. of Trustees of S. Ill. Univ.*, 686 F.3d 378, 388 (7th Cir. 2012) ("The Title VII retaliation framework applies with equal force to retaliation claims brought under Title IX."); *Papelino v. Albany Coll. of Pharmacy of Union Univ.*, 633 F.3d 81, 91 (2d Cir. 2011) ("As in the context of Title VII, a plaintiff claiming retaliation under Title IX must first establish a *prima facie* case. . . .").

These mandatory reporting mechanisms provide one more vehicle for strategic use of protected activity to defeat adverse employment actions.

III. Schools' unique vulnerabilities to retaliation claims are compounded by external pressures forcing schools to transfer and terminate personnel frequently.

Schools' unique vulnerabilities to retaliation claims are not just problems in the abstract. In the face of dwindling budgets and correspondingly smaller staffs, schools have fewer resources to implement staffing decisions required to meet students' needs. Schools, therefore, must consider the financial risks—embodied in employment litigation—of pursuing non-retaliatory, policy-based actions relating to staff who have engaged in protected activity. Schools must weigh the benefit of staffing actions that may be deemed adverse (transfer, discipline, termination) against the costs of litigation in light of their limited resources. When faced with the prospect of defending meritless retaliation claims under a more lenient mixed-motive standard, schools may avoid implementing the necessary staffing decisions just to decrease litigation risks.

Consequently, the Court's interpretation of Title VII's retaliation provision here will likely impact retaliation claims also brought under Title IX.

A. To meet numerous state and federal mandates, school districts must be able to make staffing decisions that put the most qualified person in the right position to best serve students.

The unprecedented and unrelenting challenges public schools now face make matching the right teachers to the right students more important than ever. Employment litigation impedes that goal.

Among other challenges, schools must comply with federal and state laws that require them to increase student achievement levels and provide specialized instruction for those who most need it. For example:

- No Child Left Behind ("NCLB") aims to "ensure that all children have a fair, equal, and significant opportunity to obtain high-quality education and reach, at a minimum, proficiency on challenging State academic assessments." 20 U.S.C. § 6301 (2012).[15]
- The Individuals with Disabilities Education Improvement Act, commonly referred to under its pre-reauthorization

[15] This goal is measured primarily through student attainment of adequate yearly progress ("AYP") on state assessments. 20 U.S.C. § 6301(6) (2012). A school that fails to "make AYP" goals faces certain NCLB-specified sanctions, including the replacement of school staff determined to be "relevant" to the school's AYP failures. 20 U.S.C. § 6316(b)(7)(C)(iv)(I) (2012).

name, IDEA, requires public schools to provide individualized free appropriate public education to students with disabilities. 20 U.S.C. § 1400 *et seq.* (2012).

- The McKinney-Vento Homeless Assistance Act, 42 U.S.C. § 11431 *et seq.* (2009), requires public schools to meet the unique needs of homeless youth.
- Public schools must also help non-native English speaking students or English Language Learners ("ELLs") to overcome language barriers and participate equally in the educational program. *See* Equal Educational Opportunity Act of 1974, 20 U.S.C. § 1703 (2009); *see generally Lau v. Nichols*, 414 U.S. 563 (1974).[16]

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[16] Current federal education programs soon may be supplemented with yet more. In his most recent State of the Union address, President Obama announced "a new challenge to redesign America's high schools so they better equip graduates for the demands of a high-tech economy." President Barack Obama, 2013 State of the Union Address, *available at* http://www.nytimes.com/2013/02/13/us/politics/obamas-2013-state-of-the-union-address.html?pagewanted=all. Moreover, the "sequestration" cuts to the Department of Education's funding are predicted to make it more difficult for school districts to comply with the mandates of all federal programs. According to Education Secretary Arne Duncan, sequestration would cut special education funding by $840 million, which could lead states and school districts to lay off 40,000 teachers and other school employees. Lindsey Boerma, *Education Secretary: No "Rocket Science" to Stop "Dumb" Sequester Cuts*, CBSNews.com, *available at* http://www.cbsnews.com/8301-3460_162-57570957/education-secretary-not-rocket-science-to-stop-dumb-sequester-cuts/. According to one survey, school districts expect, on average, to

To comply with these mandates, schools must retain the flexibility to select teachers with the appropriate skills and qualifications. For example, NCLB requires schools to hire teachers who are "highly qualified." 20 U.S.C. § 6319(a) (2013). Additionally, NCLB contemplates significant staffing changes in schools where student test scores have not met federal standards. Motoko Rich, *Holding States and Schools Accountable*, N.Y.TIMES, Feb. 10, 2013, at A25. Under NCLB, school administrators must be better versed than ever before in testing, instruction strategies, curriculum formation, and data analysis.[17] And teachers must be able to provide specialized instruction for students with disabilities, ELLs, and others.

These staffing demands are immediate and increasing. For example, growing demands to serve ELLs require schools to supply more teachers trained in specific research-based ELL teaching strategies.[18] Schools have also observed growth in

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eliminate between 3.7 and 4.8 instructional positions as a result of sequestration. Press Release, American Ass'n of School Administrators, AASA Members Detail Draconian Impact of Sequester's Cuts (Feb. 26, 2013), *available at* https://www.aasa.org/uploadedFiles/Policy_and_Advocacy/files/AASA%20Sequester%20Press%20Release%20022613.pdf.

[17] Kevin Butler, *Principal Preparation Programs: Equipping School Leaders for New Pressures and Challenges*, DISTRICT ADMINISTRATION, Sept. 2008, *available at* www.districtadministration.com/article/principal-preparation-programs.

[18] *See generally* Christopher B. Swanson, PERSPECTIVES ON A POPULATION: ENGLISH-LANGUAGE LEARNERS IN AMERICAN SCHOOLS 3 (2009), *available at* http://www.edweek.org/prodcts/qc/pop/qc09-pop.pdf.

the percentage of students requiring special education, whose unique educational needs demand attention from school professionals well-trained in specific strategies for serving them.[19] Accordingly, deploying teachers, administrators, and other personnel equipped to meet these growing challenges is one of the most important goals of our nation's schools.

Public schools often attempt to achieve these goals by reassigning or making other staffing changes. An increase in the non-English-speaking population in one neighborhood of a school district, for example, may lead the administration to reassign ELL teachers to a school building in that neighborhood. However, these changes may be challenged as retaliatory by school employees who have engaged in protected activity in an attempt to avert a reassignment or other change or by employees who mistakenly attribute a staffing change to a protected activity.

B. The continuing budget cuts faced by many districts have resulted in staggering numbers of staff reductions.

Schools must meet many outside benchmarks for performance, and they must do so amid severe budget cuts that often leave schools no choice but to reduce staff. In general, a school district spends

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[19] The percentage of public school students qualified for special education services grew from 8% in 1976-77 to nearly 14% in 2004-05. U.S. DEP'T OF EDUC. INST. OF EDUC. SCIENCES, DIGEST OF EDUC. STATISTICS, TABLE 49 (2007), *available at* http://nces.ed.gov/programs/digest/d07/tables/dt07_049.asp.

between 80 and 85 percent of its entire budget on salaries and benefits.[20] When times are tough financially, schools have little choice but to reduce the largest slice of their budget pie. These reductions engender employment litigation. Schools' usual budget challenges have been exacerbated by the collapse of the nation's housing market and cuts in state funding. The 2008 housing market collapse led to decreased property values, which affects schools funded in part by property taxes. State education funding has fallen below pre-recession levels in over half of the states, with 19 states implementing cuts of more than five percent.[21] With the added prospect of "sequestration," a process of automatic federal budget cuts, billions of dollars in federal education funding may be lost. *Id.*

Even before the potential loss in funding due to sequestration, schools were forced to reduce staff drastically. "[N]early 300,000 education jobs [were lost] between August 2008 and August 2011," with the rate of teacher employment falling by 7.2 percent between the 2007-2008 and 2010-2011 school years.[22] For example, California schools have been

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[20] Noelle Ellerson *School Budgets 101*, American Association of School Administrators (2011), http://www.aasa.org/uploadedfiles/policy_and_advocacy/files/schoolbudgetbrieffinal.pdf.

[21] Jennifer Ginn, *Why Johnny Can't Ride the Bus: Schools Struggle with Cuts as State Revenues Continue to Lag*, THE COUNCIL OF STATE GOVERNMENTS, *available at* http://www.csg.org/pubs/capitolideas/sept_oct_2012/educationbudgetcuts.aspx.

[22] EXEC. OFFICE OF THE PRESIDENT, INVESTING IN OUR FUTURE: RETURNING TEACHERS TO THE CLASSROOM 3 (Aug. 2012),

forced to cut approximately 32,000 teacher positions—more than ten percent of the state's teacher workforce.[23] Eighty percent of New York school districts also had to cut teaching positions, resulting in 7,000 teacher layoffs (approximately three percent of the state's teachers).[24] Texas recently reduced education spending by more than $4 billion, causing more than 12,000 teachers and support staff to be laid off.[25]

Staff reductions leave schools exposed to suits by employees who are understandably upset at losing their job. An employee who has engaged in protected activity prior to the elimination of his or her position may mistakenly believe, or may strategically allege, that the elimination was in retaliation for the protected act. A mixed-motive

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available at http://www.whitehouse.gov/sites/default/files/Investing_in_Our_Future_Report.pdf; EXEC. OFFICE OF THE PRESIDENT, TEACHER JOBS AT RISK 3 (Oct. 2011), *available at* http://www.whitehouse.gov/sites/default/files/uploads/teacher_jobs_at risk_report.pdf.

[23] Damian Dovarganes, *California's Fourth Year of Teacher Layoffs Spurs Concern*, USA TODAY, May 5, 2012, *available at* http://usatoday30.usatoday.com/news/nation/story/2012-05-05/california-teacher-layoffs/54767514/1.

[24] *New York Teacher Layoffs Hit Three Percent: Council of Superintendents Report*, HUFFINGTON POST, Oct. 12, 2011, *available at* http://www.huffingtonpost.com/2011/10/12/new-york-teacher-layoffs-_n_1006838.html.

[25] Claudio Sanchez, *Texas Schools Grapple with Big Budget Cuts*, NPR, Dec. 22, 2011, *available at* http://www.npr.org/2011/12/22/144079041/texas-schools-grapple-with-big-budget-cuts.

standard would force school districts to divert already scarce resources to either settling or defending meritless claims through trial.

C. Any increase in litigation costs, including costs stemming from adoption of a mixed-motive standard for retaliation claims, will cause schools to forego some staffing changes, no matter how beneficial to students.

The increased cost of defending meritless retaliation claims under a mixed-motive standard will cause schools to forego certain staffing decisions, however beneficial to students. The average costs of litigating a single-plaintiff employment case through trial is between $69,000 and $107,000, and litigating just through summary judgment can cost $54,000-$82,000.[26] And as the EEOC's statistics show, retaliation claims are already rising: the number of retaliation claims filed has increased in each of the last eight fiscal years, and retaliation claims outnumber charges based on all other categories of protected status, such as race, sex, age, and disability.[27] The cost of defending meritless

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[26] 25 Ideas for Mitigating Employment Practices Risk, Kibble & Prentice (Nov. 2009), *available at* http://www.kpcom.com/newsletters/documents/2009_11_Employment_Practices_Article_KP.pdf.

[27] U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *Charge Statistics FY 1997 Through FY 2012*, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Feb. 7, 2013).

retaliation claims already places a heavy burden on budget-constrained schools. Heightened by a mixed-motive standard, these costs would prevent schools from making needed staffing changes opposed by "protected" employees. The mixed-motive standard forces school districts to choose between avoiding crippling litigation costs and taking non-retaliatory actions to advance their educational goals.

CONCLUSION

For the foregoing reasons and for those in the Brief for the Petitioner, NSBA urges this Court to consider the deleterious effect a ruling for Respondent would have upon the nation's public schools as employers, and to vacate the decision of the Fifth Circuit and remand.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

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IN THE

Supreme Court of the United States

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER,

Petitioner,

v.

NAIEL NASSAR, M.D.,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation ("NELF") seeks to present its views, and the views of its supporters, on the issue presented in this case, namely whether an employee alleging retaliation under Title VII must prove that retaliation was the but-for cause of the disputed employment decision, or whether the employee need only prove that the unlawful animus was a motivating factor in the disputed employment decision.[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and small businesses located primarily in the New England region.

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[1] Pursuant to Supreme Court Rule 37.6, NELF states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Supreme Court Rule 37.3(a), NELF states that, on February 26, 2013, counsel for the petitioner filed a general written consent with this Court to the filing of amicus briefs, in support of either or neither party. Moreover, on March 6, 2013, counsel for respondent provided NELF's counsel with written consent, by email, to the filing of NELF's brief, a copy of which is filed herewith.

NELF is committed to a balanced interpretation of federal statutes regulating the conduct of businesses as employers. In this connection, NELF recently filed an amicus brief on behalf of the employer in *Vance v. Ball State Univ.*, *cert. granted* 133 S. Ct. 23 (June 25, 2012) (No. 11-556), arguing for a reasonable interpretation of Title VII with respect to an employer's vicarious liability for a supervisor's creation of a hostile work environment.[2] Similarly, in this case, where Congress has not provided otherwise, NELF opposes an unduly expansive interpretation of causation under Title VII that would shift the burden of persuasion onto the employer to *disprove* its liability, rather than requiring the employee to carry the burden of persuasion on his or her claim of unlawful retaliation.

For these and other reasons discussed below, NELF believes that its brief would provide an additional perspective to aid this Court in deciding the issues presented in this case.

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[2] In addition *to Vance v. Ball State Univ.*, NELF has recently filed many other amicus briefs on behalf of business interests, arguing for a balanced interpretation of federal constitutional or statutory standards that regulate a business's conduct. *See, e.g., Am. Express. Co. v. Italian Colors Restaurant, cert. granted*, 133 S. Ct. 594 (Nov. 9, 2012) (No. 12–133); *Spirit Airlines, Inc. v. Dep't of Transp., petition for cert. filed* (Nov. 21, 2012) (No. 12-656); *DaimlerChrysler AG v. Bauman, petition for cert. filed* (Feb. 6, 2012) (No. 11-965); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

SUMMARY OF ARGUMENT

The issue here is *who*, as between the employee and employer, should bear the burden of proof with respect to but-for causation in a Title VII retaliation claim. This Court has already resolved that issue in *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009), which establishes that an employee must prove that the employer's unlawful animus is the but-for cause of an adverse employment action, unless Congress has expressly provided otherwise in the applicable statute. Title VII's retaliation section contains no such statutory language that modifies in any way the plaintiff's foundational burden of proving but-for causation.

The Fifth Circuit in this case has erroneously limited *Gross* to claims brought under the ADEA and has mistakenly applied *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion), as the standard of causation and liability for Title VII retaliation claims. Contrary to the Fifth Circuit's view, *Gross* does *not* rest primarily on the distinction between the ADEA and Title VII. Instead, *Gross* is broadly based on this Court's interpretation of the Civil Rights Act of 1991, in which Congress apparently abrogated *Price Waterhouse* in its entirety as to all federal employment discrimination statutes, except for Title VII *discrimination* claims.

Gross is based on the salient fact that Congress responded to *Price Waterhouse* with *two* statutory provisions, the one authorizing "motivating factor" claims as a basis of liability for Title VII discrimination claims, and the other limiting the employer's *Price Waterhouse* "same decision"

affirmative defense to the remedies stage, rather than the liability stage, for such discrimination claims. If Congress had agreed with *Price Waterhouse*, then it would not have provided a "motivating factor" basis of liability and would have simply limited the employer's affirmative defense to such liability. Therefore, Congress apparently concluded in 1991 that *Price Waterhouse*'s "motivating factor" analysis had no textual basis in Title VII's "because of" causation language. For this reason, *Price Waterhouse* does not survive the 1991 Act and cannot apply to any other federal employment discrimination statute using the same, unadorned "because" language that was misinterpreted in *Price Waterhouse*, such as the ADEA section at issue in *Gross*, or Title VII's retaliation section at issue here.

Congress's abrogation of *Price Waterhouse*'s "motivating factor" analysis as the *default* standard of causation and liability in the federal employment discrimination statutes is consistent with the Court's well-established precedent that the ultimate burden of persuasion remains at all times with the employee. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). The familiar *McDonnell Douglas-Burdine* ordering of proof is sufficiently broad and flexible to accommodate all claims of discrimination or retaliation, regardless of how one may choose to characterize the employee's evidence.

In sum, both Congress in the 1991 Act and this Court have recognized that there is generally no need or justification for a separate category of disparate treatment claims that departs from

McDonnell Douglas-Burdine and the foundational legal principle that a plaintiff must prove but-for causation, by shifting the burden of persuasion onto the employer to disprove its liability. Moreover, *Price Waterhouse* invites a legion of practical (and arguably unnecessary) difficulties, such as the thorny issue of how and when to classify a case as a so-called "mixed-motive" case falling under *Price Waterhouse*, as opposed to a so-called "pretext" case falling under *McDonnell Douglas-Burdine*.

ARGUMENT

I. ABSENT EXPRESS STATUTORY AUTHORITY TO THE CONTRARY, AN EMPLOYEE MUST ALWAYS PROVE THAT AN EMPLOYER'S UNLAWFUL ANIMUS WAS THE BUT-FOR CAUSE OF AN ADVERSE EMPLOYMENT ACTION.

At issue in this case is whether an employee alleging retaliation for having raised a claim of discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), must prove that his protected activity was the but-for cause of the adverse employment action, or whether the employee need only prove that retaliation was a "motivating factor" in the decision.[3] In essence, the issue is *who*,

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[3] Section 2000e-3(a) of Title VII provides, in relevant part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . *because* he has opposed any practice made an unlawful employment practice by this subchapter, or *because* he has made a charge, testified, assisted, or participated

as between the employee and employer, should bear the burden of proof with respect to but-for causation in a Title VII retaliation claim. Must the employee prove but-for causation to prevail, or must the employer disprove but-for causation to avoid liability?

In NELF's view, this Court has already answered this question. In *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009), the Court held that an employee must prove that the employer's unlawful animus is the but-for cause of the adverse employment action, unless Congress has expressly provided otherwise in the applicable statute. *See Gross*, 557 U.S. at 174-77 & 178 n.5. As with the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 623(a), at issue in *Gross*, Title VII's retaliation section contains no such statutory language that modifies in any way the plaintiff's foundational burden of proving but-for causation.[4] Therefore, "[a]bsent some reason to believe that Congress intended otherwise, . . . we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief." *Gross*, 557 U.S. at 177 (citation and internal quotation marks omitted).

Despite *Gross*'s clear holding, the Fifth Circuit in this case has nevertheless affirmed the trial

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> in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a) (emphasis added).

[4] *See* n.3, above.

court's jury instruction, derived from *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion), which shifted the burden of persuasion onto the employer to disprove but-for causation. *See Nassar v. Univ. of Tex. Sw. Med. Ctr.*, 674 F.3d 448, 454 n.16 (5th Cir. 2012) (citing *Smith v. Xerox Corp.*, 602 F.3d 320, 330 (5th Cir. 2010)). In *Price Waterhouse*, a plurality of this Court held that, once an employee proves that an unlawful animus was a motivating factor in the challenged employment action, the burden of persuasion shifts to the employer to prove that it would have made the same decision regardless of the unlawful motive. *Id.*, 490 U.S. at 244-45. The Fifth Circuit has concluded that *Gross* is limited to claims brought under the ADEA and, therefore, that *Price Waterhouse* defines the standard of causation and liability for Title VII retaliation claims. *See Smith v. Xerox Corp.*, 602 F.3d at 329-30.

The Fifth Circuit has misinterpreted *Gross*. That case does *not* rest primarily on the distinction between the ADEA and Title VII for the purpose of determining the applicable standard of causation and liability. Instead, *Gross* is broadly based on this Court's interpretation of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, in which Congress authorized *Price Waterhouse* "motivating factor" claims solely with respect to Title VII *discrimination* claims[5] and apparently abrogated

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[5] *See* 42 U.S.C. § 2000e-2(m) ("Impermissible consideration of race, color, religion, sex, or national origin in employment practices"), which provides:

Price Waterhouse in its entirety for all other federal employment discrimination statutes, including for the Title VII *retaliation* claim at issue here. *See Gross*, 557 U.S. at 174-75 & 178 n.5.

The *Gross* Court based its interpretation of the 1991 Act on the salient fact that Congress responded to *Price Waterhouse* with *two* statutory provisions, the one authorizing "motivating factor" claims as a basis of liability for Title VII discrimination claims,[6] and the other limiting the employer's *Price Waterhouse* "same decision" affirmative defense to the remedies stage, rather than the liability stage, for such discrimination claims.[7] *See Gross*, 557 U.S.

> Except as otherwise provided in this subchapter, *an unlawful employment practice is established* when the complaining party demonstrates that race, color, religion, sex, or national origin was *a motivating factor* for any employment practice, even though other factors also motivated the practice.

(emphasis added).

[6] *See* n.5, above.

[7] 42 U.S.C. § 2000e-5(g)(2)(B) provides:

> (B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that *the respondent would have taken the same action in the absence of the impermissible motivating factor*, the court--
>
> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)),

at 178 n.5. The *Gross* Court reasoned that, if Congress had agreed with *Price Waterhouse* that "such 'motivating factor' claims were already part of Title VII," *id.*, then Congress would not have deemed it necessary to provide a "motivating factor" basis of liability. Instead, if Congress had in fact agreed with *Price Waterhouse*'s "motivating factor" interpretation of Title VII's "because of" causation language, then "the addition of § 2000e-5(g)(2)(B) alone would have been sufficient" to achieve Congress's objective of restricting the employer's *Price Waterhouse* defense to the remedies stage of a case. *Gross*, 557 U.S. at 178 n.5.

The *Gross* Court therefore concluded that, according to Congress in the 1991 Act, *Price Waterhouse*'s "motivating factor" claims had no textual basis in the "because of" causation language occurring in Title VII's discrimination section. *See Gross*, 557 U.S. at 178 n.5. That is, *Price Waterhouse* had misinterpreted Congress's intent. For this reason, *Price Waterhouse* cannot survive the 1991 Act and apply to any other federal employment discrimination statute using the same, unadorned "because" language that was misinterpreted in *Price*

> and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
>
> (ii) *shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment*, described in subparagraph (A).
>
> (emphasis added).

Waterhouse, such as the ADEA section at issue in *Gross*, or Title VII's retaliation section at issue here.

Gross establishes, then, that Congress abrogated *Price Waterhouse*'s "motivating factor" interpretation of causation, except for Title VII *discrimination* claims, codified at 42 U.S.C. § 2000e-2(m). After all, Congress chose in 1991 to add *Price Waterhouse* "motivating factor" claims to Title VII's discrimination section, while at the same time choosing not to add any such provision to Title VII's retaliation section. Under *Gross*, when Congress includes "motivating factor" claims in one statutory section but omits the same claims in another section of the same statute, the omission can only be deliberate. As the Court explained, the omnibus 1991 Act "contemporaneously amended [the related employment discrimination statutes] in several ways . . . . When Congress amends one statutory provision but not another, it is presumed to have acted *intentionally*." *Gross*, 557 U.S. at 174 (emphasis added).

Gross therefore instructs that the "because" causation language used in both the ADEA and Title VII's retaliation section means that the employee must prove but-for causation. *See Gross*, 557 U.S. at 176-77. Under that standard of causation, the burden of persuasion remains at all times with the employee to prove that the disputed employment action would not have occurred absent the retaliatory animus. *See id.*, 557 U.S. at 177-78. Accordingly, the Fifth Circuit erred in approving a jury instruction that failed to conform to the *Gross* standard of proof and that instead followed the *Price*

Waterhouse "motivating factor" standard--the very standard that Congress apparently rejected in the 1991 Act for Title VII retaliation claims. A vacatur and remand is therefore in order to enforce *Gross*'s standard of but-for causation.

Finally, Congress's abrogation of *Price Waterhouse*'s "motivating factor" analysis as the *default* standard of causation and liability in the federal employment discrimination statutes is consistent with the Court's well-established precedent that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff *remains at all times with the plaintiff*." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (emphasis added). In this connection, the familiar ordering of proof set forth in *Burdine* and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), under which the plaintiff always retains the burden of persuasion on the ultimate issue of discrimination, is a sufficiently broad and flexible model to accommodate all claims of discrimination or retaliation.[8] This is so regardless of the nature of the employee's evidence--whether it is so-called "circumstantial" or "direct" evidence of an unlawful animus, or a combination of

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[8] Under the *McDonnell Douglas-Burdine* burden-shifting scheme, the employee must first prove a *prima facie* case of discrimination, a non-onerous burden that creates a presumption of liability and requires the employer to *articulate* (but not prove) a legitimate, nondiscriminatory reason or reasons for the disputed decision. At that point, the presumption of discrimination falls away, and the employee must prove discrimination. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142-43 (2000).

both categories. It should be noted that *Price Waterhouse's* rationale was, according to one prominent concurring opinion, based on this evidentiary distinction. *See Price Waterhouse*, 490 U.S. at 276 (O'Connor, J., concurring) ("[I]n order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show *by direct evidence* that an illegitimate criterion was a substantial factor in the decision.") (emphasis added).

However, as the Court observed in *Gross*, the burden of persuasion on the ultimate issue of discrimination should always remain with the employee, *regardless* of how one may choose to characterize the employee's evidence:

> [T]he burden of persuasion necessary to establish employer liability is the same in alleged mixed-motives [*Price Waterhouse*] cases as in any other ADEA disparate-treatment action. A plaintiff must prove by a preponderance of the evidence (which may be *direct or circumstantial*), that age was the "but-for" cause of the challenged employer decision.

Gross, 557 U.S. at 177-78 (emphasis added). Nor is *Gross* the first time that this Court has acknowledged the broad range of evidence accommodated by the *McDonnell Douglas-Burdine* model. *See U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983) ("As in any lawsuit, the plaintiff may prove his case [of Title VII

discrimination] by *direct or circumstantial evidence*. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves.") (emphasis added); *Burdine*, 450 U.S. at 256 ("[The employee] may succeed in [proving intentional discrimination] *either directly* by persuading the court that a discriminatory reason more likely motivated the employer *or indirectly* by showing that the employer's proffered explanation is unworthy of credence.") (emphasis added); *Price Waterhouse*, 490 U.S. at 287-88 (Kennedy, J., dissenting) (discussing *Aikens* and *Burdine*).

In short, both Congress in the 1991 Act and this Court have recognized that there is generally no need or justification for a separate category of disparate treatment claims that departs from *McDonnell Douglas-Burdine* and the foundational legal principle that a plaintiff must prove but-for causation, by shifting the burden of persuasion onto the employer to *disprove* its liability. *See Gross*, 557 U.S. at 178-79 (discussing shortcomings of *Price Waterhouse*). *See also Gross*, 557 U.S. at 176-77 (discussing bedrock principle of but-for causation, and noting "ordinary default rule that plaintiffs bear the risk of failing to prove their claims.") (citation and internal quotation marks omitted).

Moreover, application of *Price Waterhouse*'s burden-shifting scheme would invite a legion of practical (and arguably unnecessary) difficulties, not the least of which is the thorny issue of how and when to classify a case as a so-called "mixed-motive" case falling under *Price Waterhouse*, as opposed to a so-called "pretext" case falling under *McDonnell*

Douglas-Burdine, let alone instructing a jury on such elusive matters. As the Court observed in *Gross*, "it has become evident in the years since that case [*Price Waterhouse*] was decided that its burden-shifting framework is difficult to apply. . . . [C]ourts have found it particularly difficult to craft an instruction to explain its burden-shifting framework [to a jury]. . . ." *Gross*, 557 U.S. at 179.

In sum, both Congress and the Court in *Gross* have apparently recognized the doctrinal and practical confusion created by the *Price Waterhouse* scheme. Congress has therefore chosen to restrict the application of *Price Waterhouse* solely to Title VII discrimination claims. Unless and until Congress provides otherwise, the employee raising any other claim of discrimination or retaliation must always retain the burden of proving but-for causation.

CONCLUSION

For the reasons stated above, NELF respectfully requests that this Court vacate the judgment below and remand this case for further proceedings consistent with the Court's opinion.

Respectfully submitted,

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UNIVERSITY OF TEXAS
SOUTHWESTERN MEDICAL CENTER,
Petitioner,

v.

NAIEL NASSAR, M.D.,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

Brief of the Washington Lawyers Committee for Civil Rights and Urban Affairs, the Employment Justice Center, and Employment Litigators as *Amici Curiae* in Support of Respondent

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Question Presented

This brief addresses the question whether the Court should decline to extend *Gross v. FBL Financial Services, Inc.*, 553 U.S. 474 (2008) to Title VII retaliation claims, on the ground that *Gross* was wrongly decided.

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Interest of *Amici*[1]

Amicus Washington Lawyers Committee for Civil Rights and Urban Affairs, a nonprofit public-interest organization, seeks to eradicate discrimination and to enforce the nation's civil rights laws and protect individuals' constitutional rights by providing legal assistance. In the Committee's forty-year history, its attorneys have represented thousands of persons who have alleged discrimination on the basis of race, gender, religion, national origin, color, disability, and age, in cases brought under federal and local civil-rights laws.

Amicus the Employment Justice Center (EJC) is a non-profit organization whose mission is to secure, protect, and promote workplace justice in the Washington, D.C. metropolitan area. EJC provides legal assistance on employment-law matters to low-wage workers and supports the local workers' rights movement, bringing together low-wage workers and advocates for the poor. At its weekly Workers' Rights Clinics, EJC serves approximately 1,300 workers each year, many of whom have suffered discrimination or retaliation in the workplace.

Amici Stephen C. Leckar, Julie Glass Martin-Korb, John F. Karl, Jr., Steven J. Silverberg, and Michael J. Hoare are attorneys whose practices have been devoted in substantial part to representing plaintiffs in employment discrimination cases. They and their clients have

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1. No party's counsel authored this brief in whole or in part. No monetary contribution intended to fund the preparation or submission of this brief was made by any party, any party's counsel, or anybody other than *amici* or their counsel. However, a contribution toward printing costs is expected to be made by John R. Ates. Letters evidencing the parties' blanket consent to the filing of *amicus* briefs have been filed with the Clerk.

an interest in having Title VII's retaliation provision be correctly interpreted as not requiring but-for causation.

Introduction and Summary of Argument

1. Petitioner argues that this case "should begin and end with the statutory text."[2] We agree.

However, we disagree with Petitioner about what the text means. That disagreement is not based on any difference between the statutory text here and the text at issue in *Gross*.[3] Rather, we respectfully submit that *Gross* was wrongly decided.

The holding in *Gross* rests on the premise that but-for causation is required by the use of the word *because* in the phrase "because of such individual's age."[4] But that premise was unjustified: the concept of but-for causation is not part of what the word *because* means. This is shown unmistakably by the evidence of how the word is actually used—evidence that we will present in detail.

Since *because* meant the same thing in 1964 that it means today, Title VII's prohibition against retaliation has always covered cases involving mixed motives. Even if one does not accept Respondent's argument that the retaliation provision is covered by the 1991 amendments to Title VII, those amendments did not eliminate the preexisting coverage of mixed-motive claims. The amendments could have had such an effect only if they operated as a partial repeal-by-implication. Such repeals are disfavored, and the amendments cannot reasonably be interpreted as having worked such a repeal.

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2. Pet. Br. 14.

3. *Gross v. FBL Financial Services, Inc.*, 553 U.S. 474 (2008).

4. 29 U.S.C. § 623(a)(1); *see Gross*, 553 U.S at 176–77.

The conclusion that but-for causation is unnecessary is not changed by Title VII's legislative history. Petitioner recognizes that the legislative history cannot modify Title VII's "plain statutory text."[5] And the one item that Petitioner offers from that history is inconclusive.

Similarly insufficient to overcome the clear text are Petitioner's warnings about the "jurisprudential morass" that would supposedly result if mixed-motive retaliation claims are allowed. Those warnings concern matters of policy, not of statutory interpretation. And even as a policy matter, the warnings make little sense given that the 1991 amendments to Title VII endorse and preserve mixed-motive liability in ordinary disparate-treatment cases. Regardless of how this case is decided, mixed-motive claims will continue to be brought. As a result, the ruling Petitioner seeks would do nothing to bring uniformity to the law of employment discrimination.

2. In addition to interpreting the word *because* incorrectly, *Gross* erred in its reliance on the tort law. At common law, but-for causation is required in connection with deciding whether the plaintiff's injury was caused by the defendant's actions—an issue rarely if ever in dispute in discrimination or retaliation cases. When the relevant inquiry focuses on the *reason* for the defendant's action rather than on the action's results, the common law does not require but-for causation.

In any event, even if but-for causation is thought to represent the starting point of analysis, it does not represent the ending point. The general requirement of but-for cause has exceptions, and one of those excep-

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5. Pet. Br. 21.

tions (relating to concurrent sufficient causes) applies to mixed-motive discrimination and retaliation claims.

3. For the reasons outlined above, and explained in more detail below, but-for causation is not an element of a Title VII claim for retaliation. Nor, we submit, can a defendant avoid a finding of liability by showing that it would have taken the same action even if it had not considered the impermissible reason. But that does not mean that the issue of but-for causation is irrelevant. It is relevant, however, to the issue of remedy, not liability.

Title VII gives courts discretion regarding the remedy to be awarded to a successful plaintiff. If the defendant shows that it would have taken the same adverse action even apart from the impermissible reason (i.e., if that reason was not a but-for cause of the action) the court can deny the plaintiff relief such as back pay, front pay, and reinstatement. This approach would avoid the possibility that plaintiffs in mixed-motive cases could wind up better off than they would have been had the employer not violated the law.

4. A decision extending *Gross* to Title VII's retaliation provision is not required by considerations of *stare decisis*. The Court need not decide now whether *Gross* itself should be overruled, because this case involves a different statute than the one at issue in *Gross*. Furthermore, considerations of *stare decisis* cut both ways, because Petitioner is in effect asking the Court to overrule *Price Waterhouse v. Hopkins*.[6] Faced with these competing invocations of precedent, the Court's priority should be to simply interpret the statute correctly.

The importance of getting the meaning right is amplified by the fact that the word *because* appears in many provisions of the United States Code. If *Gross*'s mis-

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6. 490 U.S. 228 (1989).

taken interpretation is held to be binding as a matter of *stare decisis*, it will affect the meaning of all those provisions, with results that might be drastic and unpredictable.

Finally, *Gross* has not engendered settled expectations about the meaning of Title VII's retaliation provision, so a refusal to extend *Gross* would not impair significant reliance interests. In contrast, *Gross* itself upset well-established expectations, and the result that we advocate would merely restore the pre-*Gross* status quo.

Our argument has not previously been advanced in this case. This case is similar in that respect to *Gross*, where the question the Court decided was raised for the first time in the respondent's brief on the merits. The Court there concluded that the respondent's argument was a "'subsidiary question fairly included'" in the question presented by the petitioner.[7] The same is true of the issues we raise here.

Indeed, those issues are even more clearly included in the question presented than was the issue decided in *Gross*. The Court there decided an issue that it regarded as a "threshold inquiry" that was necessary in order to reach the question on which *cert.* had been granted.[8] Here, on the other hand, our argument directly addresses the question presented: "Whether Title VII's retaliation provision ... require[s] a plaintiff to prove but-for causation, or instead require[s] only proof that the employer had a mixed motive[.]"[9]

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7. 557 U.S. at 173 n.1 (quoting S. Ct. R. 14.1).

8. *Id.*

9. Cert. Pet. i.

Because of the short time allowed for Petitioner to file its reply brief, we are filing this brief on the same day as Respondent's brief, rather than a week later, as the Court's rules would allow.

Argument

I. But-for causation is not required by the use of the word *because*.

The essential component of the holding in *Gross* was the conclusion that but-for causation is required by the use in the Age Discrimination in Employment Act[10] of the word *because* in the phrase "because of such individual's age."[11] Although much of the decision dealt with the question whether interpretation of the ADEA was governed by caselaw under Title VII,[12] that discussion was not sufficient, on its own, to support the decision. Rather, as the Court explained, "[the] inquiry ... must focus on the text of the ADEA to decide whether it authorizes a mixed-motives age discrimination claim."[13]

The conclusion in *Gross* about the meaning of the ADEA's was mistaken. As is shown by evidence of the actual usage of *because* and *because of*, neither of them requires but-for causation.

A. *Dictionary definitions of* because *and* because of *are inconclusive.*

The Court in *Gross* relied on dictionary definitions of the expression *because of* as meaning "by reason of" or

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10. 29 U.S.C. §§ 621 *et seq.*

11. 557 U.S. at 176–77 (discussing 29 U.S.C. § 623(a)(1)).

12. 557 U.S. at 173–75, 178–79.

13. *Id.* at 175.

"on account of[.]"[14] But those definitions do not answer the question that was before the Court in *Gross* and that is before the Court again here.

The problem is that relying on dictionary definitions merely changes the issue from the meaning of *because of* to the meaning of *on account of* and *by reason of*. And if one looks up those phrases in the dictionary, one finds that they are defined as "because of"[15] or that one is defined in terms of the other.[16] Definitions of just the word *because* present the same problem, because they are essentially the same as definitions of *because of*.[17] The definitions that *Gross* relied on are therefore unhelpful in determining what kind of causation is entailed by the use of the word *because*.

To be sure, *Gross* did not rely only on the dictionary definitions. It also relied on cases that had interpreted

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14. *Gross*, 557 U.S. at 176 (citing Webster's Third New International Dictionary 194 (1966); 1 Oxford English Dictionary 746 (1933); Random House Dictionary of the English Language 132 (1966).

15. Webster's Third New International Dictionary 13 (1961) (defining *on account of* as "for the sake of : by reason of : because of"); *account, n.*, sense P1.d(c)(i), OED Online (Dec. 2012), http://tinyurl.com/OEDaccount (giving the relevant sense of *on account of* as "by reason of, because of"); Random House Dictionary of the English Language 10 (1967) (giving the relevant sense of *on account of* as "by reason of; because of"); *id.* at 1197 (defining *by reason of* as "on account of; because of").

16. *reason, n.1*, sense P3.b, OED Online (Dec. 2012), http://tinyurl.com/OEDreason (defining *by reason of* as *on account of*).

17. *E.g.*, Webster's Third New International Dictionary 194 (1961) ("since : for the reason that : on account of the cause that"); Random House Dictionary of the English Language 132 (1967) ("for the reason that; due to the fact that").

the expressions *by reason of* and *based on* to require but-for causation. The Court cited *Bridge v. Phoenix Bond & Indemnity Co.*, which it described as "recognizing that the phrase, 'by reason of,' requires at least a showing of 'but for' causation[,]"[18] and *Safeco Insurance Co. of America. v. Burr*, where the Court had said, "In common talk, the phrase 'based on' indicates a but-for causal relationship and thus a necessary logical condition."[19] (Since none of the dictionaries cited in *Gross* defined *because* as meaning "based on," *Safeco* was presumably cited as being analogous authority, not as being directly on point.)

Nowhere in *Bridge* or *Safeco* (or in *Holmes v. SIPC*,[20] which *Bridge* relied on) did the Court address the question of how the expressions *by reason of* and *based on* are actually used in ordinary speech. The analysis in *Safeco* was limited to the conclusory statement quoted above, and in *Bridge* and *Holmes* the notion that *by reason of* entails but-for causation was merely taken for granted without any discussion.

More importantly, the conclusions in *Bridge*, *Holmes*, and *Safeco* do not reflect the meaning of *by reason of* and *based on* as those expressions are actually used. As is shown below, the usage of these expressions—like the usage of *because*, *because of*, and *on account of*—shows that they do not entail but-for causation.[21]

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18. 553 U.S. 639, 653–54 (2008) (internal quotation marks omitted by the Court).

19. 551 U.S. 47, 63 (2007).

20. 503 U.S. 258, 265–66 (1992), *cited in Bridge*, 553 U.S. at 653.

21. In addition to relying on *Bridge*, *Safeco*, and *Holmes*, the Court cited *Hazen Paper Co. v. Biggins* for the proposition that an employee's claim "cannot succeed unless the employee's pro-

B. Evidence of actual usage shows that because *and* because of *do not require but-for causation.*

1. When a word used in a statute is not expressly defined, and the statute otherwise provides no "definitive clue" to what the word means, its meaning, "has to turn on the language as we normally speak it."[22] For "there is no other source of a reasonable inference about what Congress understood when writing or what its words will bring to the mind of a careful reader."[23] Thus, "it is ordinary usage that, in the absence of contrary indication, governs our interpretation of texts."[24]

Consistent with these principles, this Court has in a number of recent cases focused, sometimes at considerable length, on how particular words or expressions are understood in everyday discourse.[25] But the Court in *Gross* did not undertake an examination of that sort. Had it done so—had it looked at how *because* and

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tected trait ... had a determinative influence on the outcome[.]" 507 U.S. 604, 610 (1993) (cited in *Gross*, 557 U.S. at 176). *Hazen* did not deal with the issue of causation and it contains language supporting the viability of mixed-motive claims. *See Gross*, 557 U.S at 184 (Stevens, J., dissenting). More importantly for present purposes, the actual usage of *determinative*—like that of *because* and the other expressions mentioned in the text—shows that the word does not entail but-for causation. See page 15, below & Appendix F.

22. *Watson v. United States*, 552 U.S. 74, 79 (2007).

23. *Id.*

24. *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2042 (2012).

25. *E.g.*, *Mohamad v. Palestinian Authority*, 132 S. Ct. 1702, 1706–07 (2012); *Caraco Pharmaceutical Labs., Ltd. v. Novo Nordisk A/S*, 132 S. Ct. 1670, 1681 (2012); *FCC v. AT&T, Inc.*, 131 S. Ct. 1177, 1181–82 (2011); *Flores-Figueroa v. United States*, 556 U.S. 646, 650–52 (2009).

because of are actually used—it could not have concluded that the *because of* requires but-for causation.

This becomes clear when one considers the possibility of expressions such as those in example (1):

(1) a. because of X and also because of Y
b. not only because X but also because Y

Assuming that *Gross* was correct about the meaning of *because*, one would expect expressions like these to be used only when neither X nor Y was an independently sufficient cause of whatever the expression related to. If both X and Y were sufficient on their own to bring about the result, neither one of them would be a but-for cause. And in that event, the word *because* would (if *Gross* is correct) be inapt. After all, part of what it means to say that *because* entails but-for causation is that the word is not used in regard to situations where such cause does not exist.

The expectation arising from *Gross* is not borne out by how *because* and *because of* are actually used. Consider the following sentences, taken from judicial opinions rendered during the 12 years preceding the enactment of Title VII:

(2) "The two cases were consolidated for trial, and upon the first trial the jury returned verdicts in favor of all of the defendants, and upon appeal to this court the judgment was reversed because of an erroneous instruction on assumption of risk and also because the court erred in giving an instruction on contributory negligence."[26]

(3) "In *State v. Smith*, a conviction was reversed because of insufficiency of the indictment and also

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26. *Dutcher v. Santa Rosa High Sch. Dist.*, 319 P.2d 14, 16 (Cal. Dist. Ct. App. 1957).

because the defendant was kept with irons on his feet during the trial."[27]

(4) "The learned president judge of the court below dismissed the appeal because of appellant's failure to file exceptions to the adjudication and also because he was satisfied, after a consideration of the merits of the appeal, that § 31 of the Law was complied with."[28]

In each of these examples, the court states two reasons for its action, each of which would be sufficient by itself to justify the action. In each example, neither of the reasons can be described as a but-for cause of the court's action. Yet in each example, the court says that it is acting *because of X and also because of Y*.

For someone who accepts *Gross*'s view of what *because* means, the examples above would be semantically anomalous. But they are in no way unusual. And the reason is that the use of the word *because* does not in fact entail but-for causation.[29]

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27. *Oregon v. Long*, 244 P.2d 1033, 1037 (Or. 1952) (citation omitted.

28. *State Bd. of Med. Educ. & Licensure v. Williams*, 94 A.2d 61, 62 (Pa. Super. Ct. 1953) (footnote omitted).

29. Title VII's retaliation provision differs from the provision at issue in *Gross* in that the provision here uses the word *because* whereas the provision in *Gross* uses the expression *because of*. Compare 29 U.S.C. § 623(a)(1) *with* 42 U.S.C. § 2000e-3(a). But that difference is of no moment. Dictionaries define *because* in terms virtually identical to those used to define *because of*. (See note 17, above.) Moreover, sentences using *because* can be reworded to instead use *because of*, with no change in meaning. Thus, Title VII's prohibition against discrimination against an employee "because he has opposed any practice made an unlawful employment practice by [Title VII], [etc.]" can be paraphrased as prohibiting discrimination "because of the employee's having opposed any practice [etc.]"

Additional examples proving this point are not hard to find. Dozens of them are provided in Appendix A. And in fact, examples can be found in opinions written by eight of the current members of this Court:

(5) **Chief Justice Roberts:** "This Court rejected that proposition, not only because it did not regard *Francis* as a new rule, but also because the state court did not 'plac[e] any limit on the issues that it will entertain in collateral proceedings.'"[30]

(6) **Justice Scalia:** "As a means of protecting children from portrayals of violence, the legislation is seriously underinclusive, not only because it excludes portrayals other than video games, but also because it permits a parental or avuncular veto."[31]

(7) **Justice Kennedy:** "We do not know anything about [Juror Z's] demeanor, in part because a transcript cannot fully reflect that information but also because the defense did not object to Juror Z's removal."[32]

(8) **Justice Thomas:** "The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race

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30. *Danforth v. Minnesota*, 552 U.S. 264, 298 (2008) (Roberts, C.J., dissenting) (alteration in the original). See also Appendix A, ¶ 1; Appendix C, ¶¶ 1–3.

31. *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2742 (2011). See also Appendix A, ¶¶ 2–5.

32. *Uttecht v. Brown*, 551 U.S. 1, 17-18 (2007).

relevant to the provision of burdens or benefits, it demeans us all."[33]

(9) **Justice Ginsburg:** "O'Hagan's charge that the misappropriation theory is too indefinite to permit the imposition of criminal liability thus fails not only because the theory is limited to those who breach a recognized duty. In addition, the statute's 'requirement of the presence of culpable intent as a necessary element of the offense does much to destroy any force in the argument that application of the [statute]' in circumstances such as O'Hagan's is unjust."[34]

(10) **Justice Breyer:** "The example is useful, not simply because as adapted it might show the importance of cross-examination (an importance no one doubts), but also because it can reveal the nature of the more general question before us."[35]

(11) **Justice Alito:** "Fitzgerald repeatedly emphasized in her briefs and at argument that she was entitled to [final] benefits not just because of the extensive delay, but also because of her indigency and the merits of her case."[36]

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33. *Grutter v. Bollinger*, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part)). See also Appendix C, ¶ 4.

34. *United States v. O'Hagan*, 521 U.S. 642, 666 (1997) (Ginsburg, J.).

35. *Williams v. Illinois*, 132 S. Ct. 2221, 2246 (2012) (Breyer, J., concurring).

36. *Fitzgerald v. Apfel*, 148 F.3d 232, 235 (3d Cir. 1998). See also Appendix A, ¶¶ 6, 7.

(12) **Justice Sotomayor:** "Perhaps, under a generous reading of the State's briefing, the State meant to convey to the District Court that Buck's case was distinguishable from the others not only because he called Quijano as a witness, but also because he elicited race-related testimony."[37]

In some of the examples above and in Appendix A, it may not be absolutely clear that each *because*-phrase denotes a cause that would be sufficient on its own to bring about the result in question. While we believe that our examples are most naturally understood in that way, in some of the examples the *because*-phrases might be understood as referring to but-for causes. But that does not undermine our argument. We do not contend that it is impossible to use *because* in a phrase that refers to a but-for cause. On the contrary, examples of such phrases do exist.[38] But the interpretation of such phrases as involving but-for causation is an inference arising from the content of the phrase as a whole, not from the meaning of *because*. Thus, our argument does not assume that all uses of *because* fit into a particular mold.

In contrast, *Gross*'s interpretation of *because* treats the concept of but-for causation as if it were hard-wired

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37. *Buck v. Thaler*, 132 S. Ct. 32 (2011) (Sotomayor, J., dissenting from denial of *cert.*).

38. For example: "IEDA stated its view that because certificates of conformity apply to 'engine families and not to individual engines,' and because 'the engine family is defined by its physical characteristics,' 'all engines that have the same physical characteristics ... are covered by the certificate of conformity issued to the engine family.'" *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 424 (D.C. Cir. 2004) (citation omitted).

into the very meaning of the word; nothing in *Gross* suggests that the Court thought *because* was ambiguous. Nor did *Gross* point to anything in the statutory context requiring that *because* be read to require but-for causation. The interpretation in *Gross* therefore cannot be squared with evidence of actual usage.

2. As previously noted, *Gross* cited cases holding that but-for causation was required by the use of the expressions *by reason of* and *based on*.[39] Similarly, the dissent in *Price Waterhouse* supported its conclusion that but-for cause is required by citing a decision that had "described the relevant question as ... whether the particular employment decision at issue was 'made *on the basis of* an impermissible factor[.]"[40] And *Gross* relied on the statement in *Hazen Paper* that an employee's claim "cannot succeed unless the employee's protected trait ... had a *determinative* influence on the outcome[.]"[41]

However, the evidence of how these expressions are actually used—like the evidence as to *because*—shows that they are not indicators of but-for causation. The same thing is true for *on account of*, which is included in the dictionary definitions cited by the Court in *Gross*. Examples proving these points are set out in Appendices B-F.

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39. See pages 7–8, above.

40. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 282 (1989) (Kennedy, J., dissenting) (emphasis added) (quoting *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 875 (1984)).

41. 507 U.S. at 610 (cited in *Gross*, 557 U.S. at 176) (emphasis added).

C. *The original meaning of Title VII's retaliation provision was not narrowed by the 1991 amendments.*

The meaning of the word *because* has not changed since Title VII was enacted in 1964. The examples we have provided of sentences using *because* are taken both from the periods 1941–1974 and 1988–2012. They therefore reflect what *because* meant in 1964 as well as what it means today). Thus, Title VII's retaliation provision—§ 704(a)[42]—has never required but-for causation.

Respondent argues that the 1991 amendments to Title VII[43] apply to § 704(a). But even if that argument is not accepted, the amendments certainly did not narrow that provision by imposing for the first time a requirement of but-for causation.

The 1991 amendments made no change to § 704(a). So the question is whether they narrowed § 704 by implication. Since any narrowing of § 704 would amount to a partial repeal, the controlling cases are those dealing with repeals by implication. And those decisions compel the conclusion that § 704(a) was unaffected by the 1991 amendments.

"While a later enacted statute ... can sometimes operate to amend or even repeal an earlier statutory provision ... repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest."[44] An implied repeal

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42. 42 U.S.C. § 2000e-3(a).

43. Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075 (1991) (codified at 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B)).

44. *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (internal quotation marks and citation omitted; alteration in the original).

will not be inferred "unless the later statute expressly contradict[s] the original act or unless such a construction is absolutely necessary ... in order that [the] words [of the later statute] shall have any meaning at all."[45] Either the two statutes must be in "irreconcilable conflict" or the later statute must "cover[] the whole subject of the earlier one and [be] clearly intended as a substitute[.]"[46]

The 1991 amendments do not satisfy these strict standards. The amendments do not "expressly contradict" Title VII's retaliation provision, they are not in "irreconcilable conflict" with it, and they do not "cover[] the whole subject" of the retaliation provision such that they are "clearly intended as a substitute" for it.

Nor is Petitioner's interpretation of the retaliation provision "absolutely necessary ... in order that [the] words [of the 1991 amendments] shall have any meaning at all."[47] The mixed-motive language added by the 1991 amendments is best seen, not as extending Title VII beyond its original scope, but as endorsing and codifying (with modifications) an interpretation that had emerged in a case (*Price Waterhouse*) in which there was no majority opinion. Indeed, the amendment has been widely regarded as doing just that.[48] Viewed that

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45. *Id.* (internal quotation marks and citation omitted; alteration in the original).

46. *Branch v. Smith*, 538 U.S. 254, 273 (2003) (internal quotation marks and citation omitted).

47. *Id.* (internal quotation marks and citation omitted; alteration in the original).

48. *See, e.g., Palmquist v. Shinseki*, 689 F.3d 66, 72 (1st Cir. 2012); *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000); *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1096 n.4 (3d Cir. 1995); *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 522 (3d Cir. 1992); *Moreno v. Grand*

way, the purpose of the "motivating factor" language was not to change the law but to confirm and clarify what it already meant.[49]

We recognize that the Court in *Gross* arguably regarded the inclusion of the "motivating factor" language in the 1991 amendments as evidence that such claims had not previously been covered by Title VII, the theory being that if mixed-motive claims were already covered, the "motivating factor" language would have been unnecessary.[50] But that reasoning is incorrect in two respects. First, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."[51] Second, the Court was operating on the erroneous assumption that but-for causation is required by the use of the word *because*.

Had the Court assumed instead that the original statute did not require but-for causation, it would most likely have reached a different conclusion regarding the

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Victoria Casino, 94 F. Supp. 2d 883, 900 (N.D. Ill. 2000); *Reiff v. Interim Personnel, Inc.*, 906 F. Supp. 1280, 1286 (D. Minn. 1995); *Crommie v. Cal. Pub. Utils. Comm'n*, 61 Empl. Prac. Dec. (CCH) ¶ 42,286, 1993 U.S. Dist. LEXIS 4714 at *2 (N.D. Cal. 1993).

49. *Cf. Wong Yang Sung v. McGrath*, 339 U.S. 33, 47 (1950) (when an agency seeks to eliminate dispute over its interpretation of a statute, a request for clarifying legislation does not amount to an admission that its interpretation was mistaken).

50. 557 U.S. at 178 n.5.

51. *Wright v. West*, 505 U.S. 277, 295 (1992) (indirectly quoting *United States v. Price*, 361 U.S. 304, 313 (1960)). *See also Varity Corp. v. Howe*, 516 U.S. 489, 525 n.4 (1996) (Thomas, J., joined by O'Connor & Scalia, JJ., dissenting) (arguing that the enactment of an amendment does not shed light on the original statute's meaning) *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 354 (1977).

1991 amendments. In particular, it would presumably have seen the amendments' "motivating factor" language as a belt-and-suspenders measure that did not evidence any doubt about what Title VII originally meant. And in any event, the Court in *Gross* certainly did not suggest that its interpretation of *because* was "absolutely necessary ... in order that [the] words [of the 1991 amendments should] have any meaning at all."[52] Nor did it conclude that the addition of the "motivating factor" language should be regarded as a partial repeal-by-implication of the original statute.

D. Departing from § 704(a)'s text is not justified by Title VII's legislative history or by Petitioner's warning of a "jurisprudential morass."

1. As other amici supporting Respondent will show, the legislative history of Title VII's enactment in 1964 supports the conclusion that retaliation claims under § 704(a) do not require but-for causation. But even if one disagrees with that conclusion, the legislative history provides no basis for departing from § 704(a)'s clear text.

Petitioner recognizes that Title VII's legislative history "could not modify the plain statutory text."[53] And beyond that, Petitioner tacitly concedes that the legislative history provides its position with no clear support: "In contrast to its clear statutory text," Petitioner

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52. *National Ass'n of Home Builders*, 551 U.S. at 662 (internal quotation marks and citation omitted; second alteration added).

53. *Id.* at 21 (citing *Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1266 (2011).

says, "Title VII's legislative history contains something for everyone[.]"[54]

The only piece of legislative history that Petitioner cites (the interpretive memorandum by Title VII's sponsors) is unilluminating.[55] In the excerpt quoted by Petitioner, the memorandum says that "the plaintiff, as in any civil case would have the burden of proving that discrimination had occurred."[56] But that truism does not advance Petitioner's argument, because it does not address the standard of causation against which the plaintiff's proof must be measured.

2. Petitioner devotes much of its brief to arguing that allowing mixed-motive claims amounts to bad policy.[57] But that argument should be addressed to Congress, not to this Court. In interpreting statutes, "[the Court's] task is to apply the text, not to improve on it."[58] So even if one agrees with Petitioner's policy argument, "[i]t is beyond [the Court's] province to rescue Congress from its drafting errors, and to provide for what [the Court] might think, perhaps along with some Members of Congress, is the preferred result."[59]

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54. Pet. Br. 20.

55. Pet. Br. 20 (citing 110 Cong. Rec. 7214 (April 4, 1964)).

56. 110 Cong. Rec. 7214.

57. Pet. Br. 24-35.

58. *Pavelic & LeFlore v. Marvel Entm't Group, Div. of Cadence Indus. Corp.*, 493 U.S. 120, 126 (1989). *See also Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 538 (1994) (Thomas, J., concurring in the judgment) (quoting the language from *Pavelic & LeFlore* that is quoted in the text and adding, "When the text of the statute is clear, our interpretive inquiry ends.").

59. *United States v. Granderson*, 511 U.S. 39, 68 (1994) (Kennedy, J., concurring in the judgment). *See also Smith v. United States*, 508 U.S. 223, 247, n.4 (1993) (Scalia, J., dissenting)

There is even greater cause than usual for honoring this principle here. It is common ground that the 1991 amendments endorsed the mixed-motive theory with respect to ordinary discrimination claims. That action represents a legislative judgment that mixed-motive claims will not create the difficulties that Petitioner warns against, or at least that whatever difficulties might arise from such claims are outweighed by the benefits of allowing the claims. Either way, the amendments express a policy that is hospitable to mixed-motive claims. And while Congress did not expressly endorse mixed-motive retaliation claims, neither did it eliminate the preexisting ability to bring such a claim under Title VII as originally drafted.

Since mixed-motive claims will continue to be brought regardless of what the Court does here, a ruling for Petitioner would unavoidably leave open the possibility that differing causation standards will govern different claims in a given case. While Petitioner's interpretation would result in the same standard being applied to both ADEA claims and Title VII retaliation claims, it would also mean that in Title VII cases alleging both retaliation and ordinary discrimination, each claim would be subject to a different standard. So Petitioner's interpretation would impose uniformity in some areas only at the cost of eliminating it elsewhere.

II. *Gross* drew the wrong conclusion from tort law.

At the end of the discussion in *Gross* of the ADEA's text, the Court quoted the statement in *Prosser and*

("Stretching language in order to write a more effective statute than Congress devised is not an exercise we should indulge in.").

Keeton on the Law of Torts that "[a]n act or omission is not regarded as a cause of an event if the particular event would have occurred without it[.]"[60] The dissent in *Price Waterhouse* had similarly relied on tort law to support its conclusion that Title VII required but-for causation.[61] But both the *Gross* majority and the *Price Waterhouse* dissent drew the wrong conclusion from the common law. Contrary to both opinions, common-law rules of causation do not justify requiring but-for causation in discrimination cases.

A. The common law does not require but-for causation with regard to issues of mixed or multiple motivations.

In cases where but-for causation is required, the question is whether the injury was caused by the defendant's *action* or *failure to act*.[62] This is reflected in the language that *Gross* quoted from *Prosser and Keeton on the Law of Torts*: "An act or omission is not regarded as a cause of an event if the particular event would have occurred without it[.]"[63] In a discrimination case, it is typically undisputed that the plaintiff's injury was caused by the defendant's action. Indeed, it is hard to imagine how a plaintiff could claim to have been discriminated against unless the employer's action was the but-for cause of his or her injury.

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60. *Gross*, 557 U.S. at 1777 (quoting W. Keeton et al., Prosser and Keeton on the Law of Torts 265 (5th ed. 1984)).

61. *Price Waterhouse*, 490 U.S. at 282 (Kennedy, J., dissenting).

62. *See, e.g.*, Restatement (2d) of Torts §§ 431, 432.

63. *Gross*, 557 U.S. at 1777 (quoting Prosser and Keeton on the Law of Torts, *supra*, at 265).

What is really at issue in retaliation and disparate-treatment cases is not the *results* of the defendant's action but the *reasons* for that action—a factor that is usually irrelevant to tort liability. And in the case of the few torts in which liability does depend on the defendant's reasons or motivations, the but-for standard is not applied in resolving questions of mixed motivation.

For example, a defendant may be held liable for malicious prosecution if he acted "primarily for a purpose other than that of bringing an offender to justice" or of "securing the proper adjudication of the claim on which [the civil proceedings] are based."[64] Similarly, one can be held liable for tortious interference with contract "if [he] acts for the primary purpose of interfering with the performance of the contract, and also if he desires to interfere, even though he acts for some other purpose in addition."[65] Claims such as these are more closely analogous to discrimination claims than are the kinds of claims (such as negligence) to which the but-for standard is most often applied.[66]

In other areas in which an actor's motivation is relevant, but-for causation is similarly inapposite. Under the doctrine of *respondeat superior*, employee's actions are imputable to the employer it they were motivated "to any appreciable extent" by "the purpose

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64. Restatement (2d) of Torts §§ 668, 676.

65. Restatement (2d) of Torts § 766, comment j

66. To be sure, the but-for standard may be relevant to a claim for malicious prosecution or tortious interference if there is a dispute about whether the plaintiff's injury was in fact caused by the defendant's conduct. Note that the same question is involved in connection with the requirement of but-for causation in RICO cases. *See Bridge*, 553 U.S. at 653-54. As a result, *Bridge* does not really support the holding in *Gross*.

of serving the master's business[.]"[67] And for the purposes of deciding whether a police checkpoint violates the Fourth Amendment, the threshold question is whether its "primary purpose was to detect evidence of ordinary criminal wrongdoing."[68]

While we do not suggest that the Court adopt a primary-reason test here, the discussion above shows that where liability depends on an actor's reasons or motivations, questions of mixed or multiple motive are resolved without reference to the standard of but-for causation.

B. Mixed-motive claims involve multiple sufficient causes, to which the requirement of but-for causation does not apply.

Even if one regards but-for causation as the default rule, it would still be inappropriate to require but-for causation in cases of mixed-motive retaliation. Such cases would come within one of the common law's exceptions to the general requirement of but-for cause: "If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about."[69] Applying this principle to cases of mixed-

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67. Restatement (2d) of Agency § 236, comment b.

68. *City of Indianapolis v. Edmond*, 531 U.S. 32, 40-42 (2000). *See also Illinois v. Lidster*, 540 U.S. 419, 423 (2004).

69. Restatement (2d) of Torts § 432(2). *See also* Restatement (3d) of Torts: Liability for Physical and Emotional Harm § 27 ("If multiple acts occur, each of which under § 26 alone would have been a factual cause of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual

motive retaliation makes perfect sense: The defendant's impermissible reason corresponds to the "force ... operating ... because of the actor's negligence," and the permissible reason to the "force ... operating ... not because of any misconduct on his part[.]"

The rationale for the concurrent cause exception is that where two individually-sufficient causes are at work, neither of them is a but-for cause, so if the plaintiff had to show but-for causation, both wrongdoers would escape liability.[70] If but-for causation were to be required in discrimination and retaliation cases, a similar situation could arise. If an employer discriminated against an employee on multiple unlawful bases, none of those bases on its own would be a but-for cause of the adverse action. If liability for discrimination on each basis required but-for causation, the defendant would avoid liability completely, because the plaintiff would be unable to show that any one discriminatory basis was a necessary cause of his injury. While that would be absurd, it would be the necessary consequence of interpreting the statutes to require but-for causation. And it would be impossible to avoid that result while remaining true to the fair meaning of the statutory text. Although it would make sense as a policy matter to interpret the statutes to require the plaintiff to show only that impermissible discrimination *of some sort* was a but-for cause of the adverse action, doing so would require going beyond the reasonable meaning of the text.

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cause of the harm."); Prosser and Keeton on the Law of Torts, *supra*, at 266–68.

70. *See, e.g.*, Restatement (3d) of Torts: Liability for Physical and Emotional Harm § 27, comment c; Prosser and Keeton on the Law of Torts, *supra*, at 266–67.

This hypothetical is not far-fetched. In *Hazen Paper*, the Court referred to the possibility of "dual liability under ERISA and the ADEA where the decision to fire the employee was motivated by both the employee's age and by his pension status."[71] But at least one case has extended *Gross* to the ERISA provision that prohibits firing employees in order to prevent their pensions from vesting.[72] And on appeal from that decision the Seventh Circuit said that "but-for causation is probably required." So unless the Court corrects the error made in *Gross*, the scenario we have described could well become a reality.

III. While but-for causation is not an element of liability, it is relevant to selecting the appropriate remedy in a given case.

So far we have not addressed the *Price Waterhouse* burden-shifting framework. For the reasons we will set out, we would submit that the most appropriate course that is consistent with the statutory text would be to retain the framework, but with the same modification that was made by the 1991 amendments. The employer would still be entitled to show that it would have taken the same action even if it had not considered the impermissible factor, but such a showing would go the question of remedy, not liability.

The dissent in *Price Waterhouse* criticized the plurality opinion for saying that while Title VII did not require the plaintiff to prove but-for causation, the

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71. 507 U.S. at 613.

72. *Nauman v. Abbott Labs.*, 49 Employee Benefits Cas. (BNA) 2052, 2010 U.S. Dist. LEXIS 95483 at *4-5 (N.D. Ill. 2010) (interpreting 29 U.S.C. § 1140), *aff'd without resolution of this issue*, 669 F.3d 854 (7th Cir. 2012).

defendant could assert as an "affirmative defense" that the impermissible reason was not a but-for cause of its action.[73] The dissent argued that this was internally inconsistent and unsupported by Title VII's language.[74] Those criticisms were justified. We therefore do not argue in favor of the affirmative defense to liability that was established by *Price Waterhouse*.

Nevertheless, the defendant should still be entitled to show that it would have taken the same action even if it had not considered the impermissible reason, but with that proof being relevant to the issue of remedy, not liability. This approach represents a logical extension of *McKennon v. Nashville Banner Publishing Co.*,[75] where the Court followed a similar approach with regard to after-acquired evidence.

McKennon was an ADEA case that reached the Court in a posture requiring the Court to assume that the plaintiff had been fired solely because of her age. The *Price Waterhouse* affirmative defense was therefore irrelevant. During the plaintiff's deposition, the employer had learned of misconduct by the plaintiff that would have provided independent grounds to fire for her if it had been known at the time. The Court held that this belatedly-discovered wrongdoing did not provide the defendant with a defense, but it did affect the relief the plaintiff could obtain.[76] In particular, the Court held that the plaintiff could not obtain reinstatement or front pay: "It would be both inequitable and pointless to order the reinstatement of someone the employer would

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73. *Price Waterhouse*, 490 U.S. at 285-86 (Kennedy, J., dissenting).

74. *Id.*

75. 513 U.S. 352 (1995).

76. *Id.* at 360-62.

have terminated, and will terminate, in any event and upon lawful grounds."[77] In addition, the plaintiff would not be entitled to back pay for the period after the employer had discovered her misconduct.[78]

This holding combines a recognition of remedial discretion under the ADEA with a direction as to how that discretion should be exercised. The remedial provision of Title VII is similar to the ADEA's,[79] and *McKennon* has been held to apply to Title VII.[80] As a result, the remedial discretion recognized by *McKennon* provides a basis on which the burden-shifting framework of *Price Waterhouse* can be retained in modified form. Under this approach, if the defendant shows that it would have taken the same action even without considering the improper reason, the plaintiff would have established that the employer had violated the law but would not be entitled to relief.

This yields an end result similar to what would happen under *Price Waterhouse*, but it does so in a way that is not subject to the criticisms of the *Price Waterhouse* dissent. Because the employer's showing would no

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77. *Id.* at 362.

78. *Id.*

79. *Compare* 29 U.S.C. § 626(b) ("'the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter") *with* 42 U.S.C. § 2000e-5(g) ("the court may ... order such affirmative action as may be appropriate").

80. *E.g.*, *Wallace v. Dunn Constr. Co.*, 62 F.3d 374, 378 (11th Cir. 1995); *Wehr v. Ryan's Family Steak Houses, Inc.*, 49 F.3d 1150, 1153 (6th Cir.1995); *Manard v. Fort Howard Corp.*, 47 F.3d 1067, 1067 (10th Cir. 1995); *Churchill v. Texas Dep't of Crim. Justice*, No. 4:11-cv-2458, 2012 U.S. Dist. LEXIS 133108, at *7–8 (S.D. Tex. Sept. 14, 2012).

longer be relevant to the issue of liability, the internal inconsistency in *Price Waterhouse* would no longer exist. And the employer's right to make that showing would now be anchored in Title VII's text—specifically, in its remedial provision.

This approach is also consistent with the original mixed-motives case—*Mt. Healthy City School District Board of Education v. Doyle*[81]—which relied on what are best regarded as remedial considerations:

> A rule of causation which focuses solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing ... The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct.[82]

The approach we advocate would also have the benefit of aligning the rules governing mixed-motive retaliation claims with those governing other mixed-motive claims under the 1991 amendments. This would simplify Title VII litigation by eliminating any complications that would arise if different types of claims were governed by differing standards.

It is true that the plurality in *Price Waterhouse* considered and rejected the idea of treating the employer's showing as a matter relevant to remedy as opposed to liability.[83] But *Price Waterhouse* predated *McKennon*,

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81. 429 U.S. 274 (1977).

82. *Id.* at 285.

83. 490 U.S. at 244 n.10.

and the plurality might well have reached a different conclusion on this point had *McKennon* been decided first. And in any event, the controlling case on this point should be the unanimous and more recent decision in *McKennon* rather than the earlier split decision in *Price Waterhouse*.

IV. Extending *Gross* to other statutes is not justified by considerations of *stare decisis*.

Although our argument will obviously raise concerns about *stare decisis*, those concerns should not prevent the Court from giving effect to the fair meaning of the statutory text. To begin with, the force of *stare decisis* here is diminished by the fact that this case involves a statute different from the one at issue in *Gross*. While it is ordinarily preferable to "achieve a uniform interpretation of similar statutory language,"[84] the decision in *John R. Sand & Gravel Co. v. United States* suggests that it can be acceptable to have "different interpretations of different, but similarly worded, statutes[.]"[85]

Furthermore, *stare decisis* cuts both ways here. *Gross* did not overrule *Price Waterhouse*, but Petitioner seeks a decision that would render *Price Waterhouse* a dead letter. So unless the Court holds that this case is distinguishable from *Gross*, it will have no choice to depart from one precedent or the other. That being so, the Court's first priority should be to get the meaning of the statute right.

What is at stake here is not just the interpretation of Title VII's retaliation, or even of other discrimination

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84. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

85. 552 U.S. 130, 139 (2008). *Cf. id.* at 145–46 (Ginsburg, J., dissenting) (noting this aspect of the decision).

statutes with similar wording. The word *because* appears in many sections of the United States Code.[86] If the Court holds the mistaken interpretation in *Gross* to be binding as a matter of *stare decisis*, it will in effect be holding, sight-unseen, that every one of those provisions requires but-for causation—for if *Gross* is *stare decisis* as to the meaning of *because* in Title VII's retaliation provision, it is *stare decisis* on that point in every federal statute where the word is used. Carving *Gross*'s misinterpretation into stone could therefore have drastic and unforeseeable consequences.[87]

The conclusion that *Gross* should not be treated as binding is further supported by the fact that Court's conclusion about the meaning of *because* was made without both sides of the issue having been fully briefed. Although respondent and its *amici* argued that but-for causation was required by the use of *because*, the petitioner did not address those arguments in its reply brief, and the issue did not come up during oral argument.[88] As a result the Court was deprived of a complete adversarial airing of the issue.

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86. House of Representatives, Office of Law Revision Counsel, *Search the United States Code*, http://tinyurl.com/USCbecause (accessed March 31, 2013).

87. In contrast, a holding that *because* does not by definition entail but-for causation would leave open the possibility that a particular provision in which *because* is used does require but-for causation. The appropriate focus would be on the provision as a whole, together with the usual indicia of statutory meaning, not on the meaning of a single word in isolation.

88. Resp. Br. 19–20, *Gross* (No. 08-441); Br. of Nat'l Fed. of Ind. Business Small Business Legal Ctr. and Soc'y for Human Resource Mgmt. 13–14, *Gross*; Pet. Reply Br. 17-25, *Gross*; Tr. of Oral Argument 3–18, 56–58, *Gross*.

Finally, *Gross* has not given rise to expectations that would be upset by a refusal to extend its holding to Title VII retaliation cases. Whatever expectations might have arisen about the meaning and scope of the ADEA, no such expectations have arisen regarding other statutes. Almost from the moment *Gross* was decided, there was uncertainty as to whether its holding should apply to statutes such as Title VII. In *Gross*'s immediate aftermath, a number of district courts regarded themselves as still being bound by circuit precedent applying the *Price Waterhouse* framework to retaliation claims,[89] and within less than a year after *Gross* a circuit split had arisen.[90]

In contrast, *Gross* itself did upend settled expectations. Every circuit that had considered the issue (nine in all) had held *Price Waterhouse* to apply to the ADEA.[91] Indeed, the respondent in *Gross* began from the premise that *Price Waterhouse* applied to the ADEA and asked that *Price Waterhouse* be overruled "with respect to its application to the ADEA."[92] It was also well established that *Price Waterhouse* applied to Title

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89. *Barney v. Consol. Edison Co.*, No. CV-99-823, 2009 U.S. Dist. LEXIS 127178, at *31 n.15 (E.D.N.Y. Sept. 30, 2009); *Hardy v. Town of Greenwich*, 629 F. Supp. 2d 192, 200 (D. Conn. 2009).

90. *See* Cert. Pet. 11–18.

91. *See Gross*, 557 U.S. at 184 n.5 (Stevens, J., dissenting) (collecting cases).

92. Resp. Br. 26, *Gross* (No. 08-441). *See also id.* at 2 ("Unless the Court overrules *Price Waterhouse*, it, and not *Desert Palace, Inc. v. Costa* still governs under the ADEA.") (citation omitted); *id.* at 30-31 n.22 (noting that although this Court had never expressly held *Price Waterhouse* to apply to the ADEA, "[t]here is ... nothing in the text of the ADEA now and the text of Title VII at the time of *Price Waterhouse* that would justify different treatment").

VII retaliation cases.[93] Thus, refusing to extend *Gross* would merely make it clear that the law governing such claims remains the same as it was before *Gross*.

Conclusion

The decision below should be affirmed.

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93. *E.g.*, *Medlock v. Ortho Biotech*, 164 F.3d 545, 550–51, 552–53 (10th Cir. 1999); *Thomas v. NFL Players Ass'n*, 131 F.3d 198, 202–03 (D.C. Cir. 1997); *Tanca v. Nordberg*, 98 F.3d 680, 682–85 (1st Cir. 1996); *Veprinsky v. Fluor Daniel, Inc.*, 87 F.3d 881, 893 (7th Cir. 1996); *Riess v. Dalton*, 845 F. Supp. 742, 745 (S.D. Cal. 1993).

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APPENDICES

Appendices

A. Additional Examples: *because* 1a
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Appendix A
Additional Examples: *because*

1. "The Intervenor Group should not be confused with the intervenors in this appeal ... who appear in support of the Commission. We use the label 'Intervenor Group' because that is what was used in the orders under review, and because the parties themselves continue to use that shorthand before us." *PSC of Ky. v. FERC*, 397 F.3d 1004, 1007 n.1 (D.C. Cir. 2005) (Roberts, J.).

2. "I think it preferable to give 'specify' this meaning not only because here it is more natural, but also because the alternative is to read the statute as leaving it up to the Attorney General whether the registration requirement would *ever* apply to pre-Act offenders, even though registration of pre-Act offenders was (as the Court acknowledges) what the statute sought to achieve." *Reynolds v. United States*, 132 S. Ct. 975, 986 (2012) (Scalia, J., dissenting).

3. "It seems very unlikely that anyone would intentionally wait to sue later rather than sooner—not only because the prospective defendant may die or dissolve, but also because prejudgment interest is normally not awarded, and the staleness of evidence generally harms the party with the burden of proof." *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 896 (1988) (Scalia, J., concurring).

4. "Allegations of violations of § 251(c)(3) duties are difficult for antitrust courts to evaluate, not only because they are highly technical, but also because they are likely to be extremely numerous, given the incessant, complex, and constantly changing interaction of competitive and incumbent LECs implementing the sharing and interconnection obligations." *Verizon Com-*

munications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) (Scalia, J.).

5. "Even this lone case is weak authority, not only because it comes from a minor court, but also because it did not involve a statute, and the same result might possibly have been achieved (without invoking constitutional entitlement) by the court's simply modifying the common-law rules of evidence to recognize such a privilege." *City of Boerne v. Flores*, 521 U.S. 507, 543 (1997) (footnote omitted) (Scalia, J.).

6. "But for PHA's payment to Truesdell's landlord of the $464 deficiency in tenant rent, Truesdell would have been ineligible for continued Section 8 housing. Thus, his success on the first claim was significant, not only because it rectified the deficiency, but also because it allowed him continued eligibility for Section 8 housing." *Truesdell v. Philadelphia Hous. Auth.*, 290 F.3d 159, 165 (3d Cir. 2002) (Alito, J.).

7. "The fact that the labels for such drugs allow IV push is striking—both because vesicants are much more dangerous than Phenergan, and also because they are so frequently extravasated." *Wyeth v. Levine*, 555 U.S. 555, 628 (2009) (Alito, J.,dissenting) (citation omitted).

8. "Rule making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations." *Attorney General's Manual on the Administrative Procedure Act* 14 (1947).

9. "Motion for summary judgment under Rule 56 is Denied because genuine issues of fact remain and

because the motion is improper." *Bass v. Harbor Light Marina, Inc.*, 372 F. Supp. 786, 794 (D.S.C. 1974).

10. "Further, the motion to reopen the case and to hear further evidence is denied, because it does not meet the standards for granting of such motions, and because the additional evidence is not material under the findings and conclusions of this case. Rule 60(b) F. R. Civ. P." *Nat'l Indem. Co. v. Harper*, 295 F. Supp. 749, 757 (W.D. Mo. 1969).

11. "A claim for future institutional care of Jehu Evans is denied because of its speculative nature and because there is nothing in the Record to indicate the value of such services." *Evans v. Pa. R. Co.*, 154 F. Supp. 14, 26 (D. Del. 1957).

12. "Here, the exemption is denied because B.B.C. was not organized and operated exclusively for educational purposes and because part of its net earnings inured to the benefit of private shareholders or individuals." *Carter v. Comm'r*, T.C. Memo 1958-166 (1958).

13. "Motion of Architectural Products Company and Binswanger Glass Company for partial remand ... is denied because movants are not parties to this appeal and because jurisdiction of the issues on the interpleader filed by Nabholz Construction Corporation is not vested in this court by the present appeal." *Bleidt v. 555, Inc.*, 485 S.W.2d 721, 723 (Ark. 1972).

14. "Because of the failure to show that there was no lack of diligence by defendant, and because the newly discovered evidence is certainly not conclusive on the question of the defendants' personal liability, we hold that the presumption in favor of the decree has not been overcome." *Ulrich v. Glyptis*, 224 N.E.2d 581, 586-87 (Ill. App. Ct. 1967) (citation omitted).

15. "His conviction is reversed and a new trial is granted, because it was prejudicial error to retry him on the previously dismissed counts and because prejudicial cross-examination of him was conducted with respect to specific facts of other crimes and wrongful acts committed by him which were similar in various details to the crimes for which he was on trial." *New York v. Reingold*, 353 N.Y.S.2d 978 (App. Div. 1974) (headnote).

16. "Judgment on a general verdict for plaintiff is reversed and a new trial is granted, because of prejudicial errors in the receipt of evidence and because of serious deficiencies in the court's instructions to the jury." *Jasinski v. N.Y. Central R.R.*, 250 N.Y.S.2d 942 (App. Div. 1964) (headnote).

17. "Appellant asserts that the judgment should be reversed because, as a matter of law, his letters were not 'outrageous' or 'beyond all reasonable bounds of decency,' and because there was no evidence that Greene suffered any mental distress as a result of the letters." *Moore v. Greene*, 431 F.2d 584, 591 (9th Cir. 1970).

18. "[D]efendant's brief, in addition to answering plaintiff's argument with regard to misuse, asserted that the judgment of the district court should be affirmed because the patent is invalid and because of other alleged misuses of it by plaintiff." *Tinnerman Prods., Inc. v. George K. Garrett Co.*, 292 F.2d 137, 138 (3d Cir. 1961).

19. "[P]laintiff is here insisting that the judgment should be reversed because the case was not one for summary judgment but for trial, and because, if the case was one for summary judgment, the judgment should have been for plaintiff." *Mfrs. Cas. Ins. Co. v.*

Martin-Lebreton Ins. Agency, 242 F.2d 951, 952 (5th Cir. 1957).

20. "They contend that the referee's order should be reversed because the evidence does not support certain findings of fact and also because the referee, in certain respects, failed to comply with the provisions of the Bankruptcy Act." *In re Graco, Inc.*, 249 F. Supp. 405, 406 (D. Conn. 1965).

21. "[The defendant] has appealed, claiming that the judgment of conviction should be reversed because certain evidence was erroneously admitted and because of the insufficiency of the evidence to support the verdict." *Fuller v. Alaska*, 437 P.2d 772, 773 (Alaska 1968).

22. "Defendant contends that his conviction should be reversed because the court erred in refusing to grant him a continuance to procure a material witness and because he was entrapped into committing the offense charged." *Arizona v. Cotton*, 443 P.2d 404, 405 (Ariz. 1968).

23. "Through his attorney, the defendant contends that the judgment should be reversed because of the insufficiency of the evidence to establish an intent to defraud and because he was not granted a speedy trial." *California v. Davis*, 176 Cal. App. 2d 80, 84 (1959).

24. "He contends that the conviction should be reversed because there was an unlawful search and seizure and because the identity of the informer was not disclosed." *Illinois v. Miller*, 216 N.E.2d 793, 794 (Ill. 1966).

25. "Appellant argues that the judgment of the trial court should be reversed because he should not have been required to attach a copy of the proceedings of the

City Council and because the actions of the Mayor and Aldermen should have been construed to be in effect, an appointment by the Aldermen." *People ex rel. Skonberg v. Paxton*, 211 N.E.2d 591, 593 (Ill. App. Ct. 1965).

26. "Defendants now contend that the order should be reversed because there was no notice of the appointment of a receiver, and because the order did not comply with the statute providing for a bond to the adverse parties insuring the payment of any damages they might sustain by reason of the appointment and acts of the receiver in case the appointment were to be revoked or set aside." *Frerk v. Frerk*, 188 N.E.2d 773, 775 (Ill. App. Ct. 1963).

27. "The judgment should be reversed because the verdicts are against the weight of the evidence and also because of errors in the trial court's instruction to the jury and in receiving evidence." *Crossett v. Natali*, 297 N.Y.S.2d 200, 201 (App. Div. 1969).

28. "We have reviewed the evidence and find that it was sufficient to support the decree denying relief to appellant and dismissing his bill because of laches in seeking relief, and also because the issue of fraud was not adequately supported by proof." *Barrett v. Bean*, 147 So. 2d 820, 821 (Ala. 1962).

29. "We are of opinion, therefore, that the decree granting the permanent mandatory injunction was laid in error and must be reversed not only because of the absence of necessary parties defendant but also because the case was not ready for submission except on the application for temporary injunction." *Methvin v. Haynes*, 46 So. 2d 815, 820 (Ala. 1950).

30. "A rehearing in this case was granted, primarily because of its public importance and also because of an

error in our original opinion relative to the legislative history of R.S. 38:1071, subd. B." *Louisiana ex rel. Bd. of Comm'rs v. Bergeron*, 106 So. 2d 295, 304 (La. 1958).

31. "Thereupon the insurance company denied liability because of the failure of the assured to aid in securing evidence and also because of the false reports previously made." *Leach v. Fisher*, 74 N.W.2d 881, 885 (Mich. 1956).

32. "The School District applied to the Department of Licenses and Inspections for a permit to construct the school plant, which was denied because of the above failures to comply with the zoning provisions, and also because a school was not a permitted use within the districts wherein the property was located." *Sch. Dist. v. Zoning Bd. of Adjustment*, 207 A.2d 864, 866 (Pa. 1965).

33. "We reverse because of the failure in proof of misrepresentations and also because of the waiver of the asserted misrepresentations." *Prudential Ins. Co. v. Barden*, 424 F.2d 1006, 1006 (4th Cir. 1970).

34. "In this case, we are compelled to affirm not only because of *Wilson v. Gray*, but also because of our decision in *Symons v. Klinger*." *Poole v. Fitzharris*, 396 F.2d 544, 546 (9th Cir. 1968) (citation omitted).

35. "In *Taub* the Rule 23 motion was denied not only because of the delay in bringing on the motion but also because of other inappropriate conduct on the part of counsel." *Zolotnitzky v. Yablok*, No. 67 Civ. 4185, Fed. Sec. L. Rep. (CCH) ¶ 94,513, 1974 U.S. Dist. LEXIS 9234 at *7 (S.D.N.Y. March 29, 1974) (citation omitted).

36. "The closing scheduled for April 20, 1966 never took place because of the trading suspension and also because in the meantime a lawsuit had been started by

one claiming that it had a contract of purchase with Crofoot." *SEC v. Great Am. Indus.*, 259 F. Supp. 99, 108 (S.D.N.Y. 1966).

37. "[T]he court finds as a matter of fact that the defendants have been seriously prejudiced by plaintiff's failure to file suit until August 30, 1968, four years and eleven months after the alleged accident occurred, because of their inability to locate certain witnesses, because other witnesses have now forgotten important facts, and also because of the extensive, complicated, and confusing medical treatment administered the plaintiff, over which they had no control." *La Lande v. Gulf Oil Corp.*, 317 F. Supp. 692, 696 (W.D. La. 1970).

38. "Burnett testified that he made no effort to locate Smith when these vacancies occurred because he did not know where to find him and also because he thought that Smith was working elsewhere.'" *F. W. Po[illegible] Mfg. Co. v. NLRB*, 119 F.2d 45, 47 (4th Cir. 1941) (int[illegible]l quotation marks omitted).

39. "Under the evidence herein, the distinction between stove and light naphtha and fuel oils seems obvious because of several indisputable factors." *Porter v. Tankar Gas, Inc.*, 68 F. Supp. 103, 109 (D. Minn. 1946).

40. "At this point the question arises whether this is a proper case for the application of the doctrine of *Gaidry Motors v. Brannon, Ky.* Because of many factors pointed out so clearly in the dissenting opinion in that case, the decision in the *Gaidry Motors* case must be narrowly confined." *Armour v. Haskins*, 275 S.W.2d 580, 583 (Ky. 1955) (citation omitted).

41. "[In *Atkinson v. New Britain Machinery Co.*,] as the court stated, the contract on its face appeared to be terminable on a month-to-month basis. However, be-

cause of numerous other reasons clearly set forth by the court, the contract was correctly held to be a term contract, from year to year." *Summers v. Ralston Purina Co.*, 69 So. 2d 858, 863 (Ala. 1954).

42. "While we recognize the liberalization of the discovery rules relating to shareholders established by the *Hobart* case, we do not think it applicable to the instant case because of several distinguishing factors." *Nat'l Auto. & Cas. Ins. Co. v. Payne*, 261 Cal. App. 2d 403, 410 (1968) (citation omitted).

Appendix B
Additional Examples: *by reason of*

1. "We start with the proposition that in a federal, criminal case the requirement of unanimity applies not only by reason of F. R. Crim. P., Rule 31(a), but also by reason of the Sixth Amendment." *United States v. Morris*, 612 F.2d 483, 488-89 (10th Cir. 1979) (footnotes omitted).

2. "According to plaintiff, this Court has subject matter jurisdiction not only by reason of diversity of citizenship, but also under the federal statute which invests district courts with original jurisdiction over non-jury civil actions brought against a foreign state." *Walpex Trading Co. v. Yacimientos Petroliferos Fiscales Bolivianos*, 109 F.R.D. 692, 693 (S.D.N.Y. 1986).

3. "'An income tax return may be false, not only by reason of an understatement of income, but also because of an overstatement of lawful deductions or because deductible expenses are mischaracterized on the return.'" *United States v. Helmsley*, 941 F.2d 71, 92 (2d Cir. 1991) (quoting from jury instructions).

4. "The State Board's conclusion that the local board had sustained its burden of proving Rowley's inefficiency is defective not only by reason of its failure to have considered the hearing transcript but also because it made no findings of fact in support thereof." *Rowley v. Bd. of Educ.*, 205 N.J. Super. 65, 76, 500 A.2d 37, 42 (App. Div. 1985).

5. "[P]laintiffs are parties to the GCA not only by reason of their membership in the NYSA, but also as direct signatories." *Korea Shipping Corp. v. New York*

Shipping Ass'n–Int'l Longshoremen's Ass'n Pension Trust, 880 F.2d 1531, 1534 (2d Cir. 1989).

6. "Bear Stearns contends that the jury's award represents a miscarriage of justice, and that, not only by reason of its size, but by the allegedly new legal duties this determination would place on all securities dealers if the verdict were allowed to stand, the case has generated 'shock and attention in the brokerage and legal communities.'" *De Kwiatkowski v. Bear Stearns & Co.*, 126 F. Supp. 2d 672, 677 (S.D.N.Y. 2000).

7. "Accordingly, given this prior deposition testimony, this theory fails not only by reason of its prior contradiction but its inherent unbelievability." *Flug v. Carag*, No. 93 Civ. 1591 (RO), 1999 U.S. Dist. LEXIS 16799 at *8-9 (S.D.N.Y. Oct. 26, 1999).

8. "This item of evidence possesses significance not only by reason of the manner in which it was signed, but also by reason of the nature of its subject matter." *Farmers & Merchs. Bank v. Kirk*, 332 P.2d 131, 132 (Cal. Dist. Ct. App. 1958).

9. "At the time counsel for plaintiffs undertook the representation of the plaintiffs, they undoubtedly knew that Texaco would vigorously defend this action, not only by reason of the monetary claims but also by reason of the effect on Texaco's marketing practices in at least the Spokane area." *Hasbrouck v. Texaco, Inc.*, 631 F. Supp. 258, 265 (E.D. Wash. 1986).

10. "[The district court] rejected any notion that the provisions for relief from penalties in the Bankruptcy Tax Act could have any application, not only by reason of the fact that the Tax Act was not in effect at the time of the inception of the *Benson* case, but also by reason of the fact that it applied only to penalties and not express-

ly to interest." *In re Irvin*, 95 B.R. 1014, 1019 (Bankr. W.D. Mo. 1989) (citation omitted).

11. "The publication of this lecture seems justified not only by reason of the special distinction of Professor Thayer, but also by reason of the light which it throws upon the attitude of his generation of teachers towards the aims and methods of legal education." Mark DeWolfe Howe, *Preliminary Note, The First Law School Lecture of James Bradley Thayer*, 2 J. Legal Educ. 1, 1 (1949).

12. "In fact, as recognized in *Schakner*, an issue can be beyond the scope of arbitration not only by reason of language in the arbitration agreement but also by reason of a prior adjudication." *Peregrine Fin. Group v. Ambuehl*, 722 N.E.2d 723, 727 (Ill. App. Ct. 1999).

13. "The judge charged the jury in general terms (among other things) that each defendant could be found guilty on each indictment against him not only by reason of his own individual acts but also by reason of his participation with one or more of the other defendants in a joint venture." *Massachusetts v. Savoy*, 488 N.E.2d 31, 32 (Mass. App. Ct. 1986).

Appendix C
Additional Examples: *based on*

1. "Based not only on common sense but also his experience as a narcotics officer and his previous work in the neighborhood, Officer Devlin concluded that what happened on that street corner was probably a drug transaction." *Pennsylvania v. Dunlap*, 555 U.S. 964, 967 (2008) (Roberts, C.J., dissenting from the denial of *cert.*).

2. "Resisting this point, the dissent rejects the expert testimony that problems with the IV administration of sodium thiopental would be obvious, testimony based not only on the pain that would result from injecting the first drug into tissue rather than the vein, but also on the swelling that would occur." *Baze v. Rees*, 553 U.S. 35, 60 n.6 (2008) (Roberts, C.J.) (citations omitted).

3. "The Court's holding is not only based on a misreading of our retroactivity cases, but also on a misunderstanding of the nature of retroactivity generally." *Danforth v. Minnesota*, 552 U.S. 264, 303 (2008) (Roberts, C.J., dissenting).

4. "*Russell* cannot be so easily dismissed. Our holding in that case was based not only on the text of § 409, but also on 'the statutory provisions defining the duties of a fiduciary, and the provisions defining the rights of a beneficiary.'" *Varity Corp. v. Howe*, 516 U.S. 489, 523 (1996) (Thomas, J. dissenting).

5. "What we have then is a situation where three States assert against a river, whose dependable natural flow during the irrigation season has long been overappropriated, claims based not only on present uses but

on projected additional uses as well." *Nebraska v. Wyoming*, 325 U.S. 589, 610 (1945).

6. "The Trial Judge stated clearly that his evaluation of credibility was based not only on what the Court felt was a misrepresentation but on demeanor and all other factors which might influence a trier of fact in judging credibility." *Somlo v. United States*, 416 F.2d 640, 643 (7th Cir. 1969).

7. "[The witness's] awareness of the situation was based not only on reliable information but concretely upon his own investigation as well." *Matthews v. United States*, 407 F.2d 1371, 1378 (5th Cir. 1969).

8. "Such conclusion is based not only on our finding that the State of Alabama's objections to the regulation issued by the Secretary are without merit but also upon our finding that the Secretary in issuing such regulation was clearly acting within its rule-making power conferred upon it by statute." *Gardner v. Alabama*, 385 F.2d 804, 817 n.8 (5th Cir. 1967).

9. "These regulations contain tables of fire-resistive assemblies which are to a considerable extent not only based on fire texts, but in most instances on several years of field experience." Ralph E. Carlson, *The Fire Marshal's Point of View on Fire Tests*, American Society for Testing and Materials, Symposium on Fire Test Methods (1962) 121, 129 (1963), *available at* http://tinyurl.com/FireMrshl (last accessed March 20, 2013).

10. "Affirming the trial judge's admission of the testimony, the Wisconsin Supreme Court said it was modifying its rule to recognize the 'realities of modern medical practice' under which a physician 'makes his diagnosis based not only on his objective findings made on examination, but also with due regard to the state-

ments made by the patient both as to his history and as to his subjective complaints.'" *Evidence ... medical testimony*, 50 ABA J. 777, 777 (Aug. 1964), *available at* http://tinyurl.com/ABAJnl (last accessed March 20, 2013).

11. "Similarly, conflict may occur within the juvenile court clinical teams where only the psychiatrist may submit reports to the court, which are, however, based not only on his own findings but also on those of his team members." R.G. Andry, *The Problem of Teamwork: Some Contributions from Social Psychology*, 1 Tadeusz Grygier et al., eds., Criminology in Transition: Essays in Honour of Hermann Mannheim 127, 129 (1965), available at http://tinyurl.com/RGAndry (last accessed March 20, 2013).

12. "The Federation has long supported the plan which calls for managerial control of installations using dangerous amounts of fissionable material. Its support of this plan is based not only on narrow technical problems of atomic energy but especially on broader arguments of human motivation." Robert E. Marshak, *Present State of the UN Negotiations on Atomic Energy*, 4 Bulletin of the Atomic Scientists No. 1 at 2, 2 (Jan. 1948), *available at* http://tinyurl.com/Marshak (last accessed march 20, 2013).

Appendix D
Additional Examples: *on the basis of*

1. "Under the Guidelines, a defendant convicted of conspiracy may be sentenced not only on the basis of his own conduct, but also on the basis of the 'conduct of others in furtherance of the execution of the jointly-undertaken criminal activity that was reasonably foreseeable by the defendant.'" *United States v. Garcia*, 909 F.2d 1346, 1349 (9th Cir. 1990) (quoting U.S.S.G. § 1B1.3 cmt. n.1).

2. "Fundamentally, Barnette was not entitled to the information contained on the disputed documents, not only on the basis of privilege but also because the reasons for the prosecutors' strikes were fully aired in open court and on the record during voir dire." *United States v. Barnette*, 644 F.3d 192, 210 n.* (4th Cir. 2011).

3. "Here, the district court made the determination of reasonableness on the basis of not only the presumptive validity of market forces, but also the affidavits of the parties which assured the court that rates had been negotiated, supporting documentation had been reviewed and pertinent questions asked." *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 775 (7th Cir. 2010).

4. "In the habeas proceeding, Hall attacked his conviction not only on the basis of the evidentiary use of the fruits of the search, but also on the basis that his confession, used at the trial, was coerced and inadmissible." *Hall v. Warden, Md. Penitentiary*, 364 F.2d 495, 496 n.6 (4th Cir. 1966).

5. "When, as here, a statute does not require that a particular kind of rule making be on a record made after a public hearing, the Commission is not confined to evi-

dence presented in some formal manner. It may act not only on the basis of the comments received in response to its notice of rule making, but also upon the basis of information available in its own files, and upon the knowledge and expertise of the agency." *Cal. Citizens Band Ass'n v. United States*, 375 F.2d 43, 54 (9th Cir. 1967).

6. "Thus, Davidoff is likely to succeed in its trademark infringement claim not only on the basis of CVS's interference with Davidoff's quality control, but because CVS is selling under Davidoff's mark goods that are materially different from Davidoff's genuine trademarked product." *Zino Davidoff SA v. CVS Corp.*, 571 F.3d 238, 246 (2d Cir. 2009).

7. "An alien may be eligible for asylum not only on the basis of persecution by a governmental group, but also on the basis of persecution by non-governmental group that the government cannot control." *Domingo-Francisco v. U.S. Att'y Gen.*, 322 Fed. Appx. 849, 850 (11th Cir. 2009).

8. "We also observe that Mr. Schwimmer in his earlier deposition testimony believed the advertisements were run not only on the basis of what the advertising agent told him, but also because he assumed Sonam would not otherwise have issued the credit." *Schwimmer v. Sony Corp. of Am.*, 637 F.2d 41, 45 (2d Cir. 1980).

9. "In *Merriam v. Kunzig*, we recognized that an unsuccessful bidder for a government contract had standing to challenge an adverse procurement decision, not only on the basis of his own rights but those of the public as well." *Sea-Land Serv., Inc. v. Brown*, 600 F.2d 429, 432 (3d Cir. 1979) (citation omitted).

10. "At trial, Clark challenged the 117 patent not only on the basis of invalidating activity under 35 U.S.C. § 102(b), but also on the basis of obviousness as that term is defined by 35 U.S.C. § 103." *Clark Equip. Co. v. Keller*, 570 F.2d 778, 796 (8th Cir. 1978).

11. "*Robinson* and *Gustafson* permit the search of the *person* incident to a custodial arrest not only on the basis of possible subjective fear of the arresting officer, but on well-established principles governing a search incident to lawful arrest." *United States v. Stevens*, 509 F.2d 683, 689 n.7 (8th Cir. 1975).

12. "We conclude that an oral agreement for charter of a ship, such as involved in this case, is not sufficient to allow the Government to recover in a damage action for breach of contract. The applicable statute and regulations require a written agreement. We reach this conclusion not only on the basis of the statute and regulations, but also on two additional factors. " *United States v. Am. Renaissance Lines, Inc.*, 494 F.2d 1059, 1067 (D.C. Cir. 1974).

Appendix E
Additional Examples: *on account of*

1. "Quiktrip has adopted the position that the plaintiff was terminated not only on account of the lost checks, but also for the loss of approximately $ 150.00 on December 19, 1989. Therefore, Quiktrip maintains that plaintiff's grievance would have been denied notwithstanding that the checks were found." *Ruiz v. Quiktrip Corp.*, Civil Action No. 91-2483-EEO, 1993 U.S. Dist. LEXIS 7587, at *7 (D. Kan. May 28, 1993).

2. "Courts will, of course, reconsider a decided case not only on account of newly discovered evidence and to correct a clear error or prevent manifest injustice—which grounds we have just commented upon—but also on account of an intervening change in controlling law." *LiButti v. United States*, 178 F.3d 114, 119 (2d Cir. 1999).

3. "We have held that persecution 'on account of' political opinion includes persecution not only on account of political opinions that the petitioner actually holds, but also on account of opinions that the persecutor falsely attributes to the petitioner" *Canas-Segovia v. INS*, 902 F.2d 717, 729 (9th Cir. 1990) (Leavy, J., concurring specially).

4. "Further, the evidence of bad acts toward the victim is relevant to the existence of the 'heinous, atrocious, or cruel' aggravating circumstance because it tended to show the victim feared her husband and endured psychological torment during the attack, not only on account of the danger to her own life but also that to the life of her son, who tried to stop his father's attack." *North Carolina v. Syriani*, 428 S.E.2d 118, 143-44 (N.C. 1993).

5. "In passing, Azcarate's brief asserts that he was persecuted not only on account of his political opinion, but also on account of his membership in a particular social group" *Azcarate v. U.S. Att'y Gen.*, 221 Fed. Appx. 932, 937 n.2 (11th Cir. 2007).

6. "Coastal argues that expedition is essential not only on account of FOIA's mandate but because without access to the documents, Coastal will be prejudiced in the DOE enforcement proceedings." *Coastal States Gas Corp. v. Dep't of Energy*, 644 F.2d 969, 982 (3d Cir. 1981).

7. "And [the witness]was damaging to Yarbrough not only on account of the Bussey jailhouse conversation, but also because he testified to the payment of money to Yarbrough in Calvin Davis' van." *Yarbrough v. Warden, Mansfield Corr. Inst.*, Case No. 3:08-cv-123, 2009 U.S. Dist. LEXIS 131356, at *68-69 (S.D. Ohio Dec. 28, 2009).

8. "Generally speaking, track structure may be retired not only on account of physical exhaustion from use but also due to obsolescence stemming from technological advances or the abandonment of a particular line." *Chesapeake & Ohio R.R. Co. v. Comm'r*, 64 T.C. 352, 359 (1975).

9. "Judge Coxe found that the defendants' 1929 code was to a substantial extent copied from the 1912 code of Hartfield. He reached this conclusion not only because of a large number of substantially identical phrases that are in the two codes and certain sequences of phrases which he thought significant but also on account of a considerable number of common errors." *Hartfield v. Peterson*, 91 F.2d 998, 999 (2d Cir. 1937).

10. "In the case at bar, causation has not been established. This is true not only on account of the considerable number of past employers of the decedent, engaged in the same operations where he was exposed to the same hypothetical dangers, without any clear showing that he contracted this disease while at National Cabinet Company but, even more importantly, for the reason that without any scientific evidence of causation there is likewise an absence of any statistical basis for opinion based on *post hoc, ergo propter hoc*, as claimant's physician admits, and as is clearly apparent." *Miller v. Nat'l Cabinet Co.*, 168 N.E.2d 811, 817 (N.Y. 1960).

11. "The passage which has been quoted from Wigmore is important not only on account of his authority and clarity, but also for the reason that it was followed in *People* v. *Del Vermo* (*supra*)." *New York v. Marks*, 160 N.E.2d 26, 28 (N.Y. 1959).

12. "It is then urged that plaintiff was entitled to go to the jury not only on account of the inference of negligence arising from the application of res ipsa loquitur but on the failure of defendant to warn plaintiff of the hidden peril and also on the inference of negligence that might arise from the facts and circumstances." *Terrell v. First Nat'l Bank & Trust Co.*, 226 P.2d 431, 436 (Okla. 1950).

13. "The majority's decision, in effect, to overrule *Young* is particularly troublesome, not only on account of its sua sponte character, but also because the parties incorporated *Young*'s definition of 'paying quantities' into their contract." *T.W. Phillips Gas & Oil Co. v. Jedlicka*, 42 A.3d 261, 282 (Pa. 2012) (citation omitted).

14. "[The witness] was evidently prejudiced against Plaintiff not only on account of her attempt to foreclose his mortgage, but because he lost most of Elliott's business when she took charge." *Young v. Levy*, 32 S.E.2d 889 (S.C. 1945).

Appendix F
Additional Examples: *determinative*

1. "Furthermore, in the regulatory scheme applicable to this case, the Defendant's ultimate decision to deny certification as a DBE must be upheld if the decision can be sustained on any of the three determinative issues of contribution, independence, or control." *Shear-in Constr. v. Mineta*, 232 F. Supp. 2d 608, 615 (E.D. Va. 2002).

2. "Even in its final opinion it relied upon one ground that we consider utterly insubstantial .... Since we regard the Commission's principal justification, which we validate below, to have been independently determinative, reliance upon this erroneous ground does not require remand for reconsideration." *De Perez v. FCC*, 738 F.2d 1304, 1309 n.6 (D.C. Cir. 1984).

3. "Under the standard we adopt today, a basic finding of liability under the Act requires that age be at least one of possibly several 'determinative factors' in the employer's conduct ...." *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1551 (10th Cir. 1988).

4. "The Court sees two independently determinative flaws in the Government's election to predicate its request on the SCA, rather than on a probable cause warrant under Fed. R. Crim. P. 41 ...." *In re Application of the United States for an Order Directing Provider of Elec. Communication Serv. to Disclose Records to the Gov't*, 534 F. Supp. 2d 585, 601 (W.D. Pa. 2008).

5. "*Russ* differs factually from the case at bar in several determinative ways and is, therefore, distinguishable." *Bondarenko v. Astrue*, 129 Soc. Sec. Rep. Service 866 (M.D. Fla. 2008).

6. "We have not detailed the merits of Ms. Shen's claims for relief from removal because this petition for review involves two determinative procedural flaws." *Yingwei Shen v. Holder*, 370 Fed. Appx. 915, 916-17 (10th Cir. 2010).

7. "Several determinative factors existed in *Resorts* that do not exist in the instant case." *Air Cargo, Inc. Litig. Trust v. i2 Techs., Inc.* (*In re Air Cargo, Inc.*), 401 B.R. 178, 187 (Bankr. D. Md. 2008).

8. "We accordingly hereby certify the following two determinative questions of law to the Supreme Court of Texas. We note that either of these questions could be determinative of the outcome of this appeal, but that if one question is answered in the affirmative, the other will no longer be determinative of the instant appeal." *Evanston Ins. Co. v. Legacy of Life, Inc.*, 645 F.3d 739, 751 (5th Cir. 2011).

9. "The district court erred in relying on *Evans* and its progeny. These cases are inapposite in two determinative respects." *Pallas v. Pacific Bell*, 940 F.2d 1324, 1326-27 (9th Cir. 1991) (citation omitted).